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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

No. 569

GENERAL FOODS CORPORATION, HUNT FOODS, INC. AND MORTON SALT COMPANY,

*Petitioners,*

*vs.*

STATE WHOLESALE GROCERS, ZEIGMUND WHOLESALE GROCERY CO., INC., RALPH C. BERG, D/B/A BERG'S FOOD STORE, ET AL.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.


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*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your Petitioners, General Foods Corporation, Hunt Foods, Inc., and Morton Salt Company (hereinafter sometimes referred to as "Defendant Suppliers") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 25, 1958, as amended on September 17, 1958.

The Respondents, being all of the original plaintiffs except for three who withdrew from the case prior to the decision of the District Court, are as follows: State Wholesale Grocers, a corporation; Zeigmund Wholesale Grocery Co., Inc., a corporation; Ralph C. Berg, d/b/a Berg's Food Store; Leo Bernard, d/b/a Leo's Food Mart; Bernard Bruski, d/b/a United Meat Market; Eph Goldstein, d/b/a Goldstein's Progressive Foods; Earl Larson and Warren Larson, co-partners, d/b/a Franklin Grocery and Market; Jack Levin and Harvey Berebitsky, co-partners, d/b/a Harvey's Super Mart; O. V. Makela, d/b/a Makela's Food Store; John L. Malevitis, d/b/a Fruitland Foods; Jack E. Markus, d/b/a Alliance Meat Shop; Carmen Mastri, d/b/a Cicero Lake Food Mart; Steven J. Minarik, d/b/a Norward Park I.G.A.; Henry E. Muir and Hugh A. Muir, co-partners, d/b/a Fifth Avenue Food Mart; Stanley Piekarz, d/b/a Steven's Certified Super Marts; Anthony Racz, d/b/a Save-Way Food Mart; Edw. J. Schuetz, d/b/a Schuetz' I.G.A. Super-Marts; Joseph D. Stone, d/b/a Clover Food Mart; Robert M. Wagner and Elizabeth Wagner, co-partners, d/b/a Wagner Grocery and Market; Atlas Market Company, a corporation; Dominicks Finer Foods, Inc., a corporation, and Carl A. Schletz, Inc., a corporation.

## OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 258 F. 2d 831 (Adv. Sheet No. 4, November 3, 1958) and is printed in its entirety in the Appendix hereto. The opinion of the District Court, together with its 183 specific Findings of Fact and 18 Conclusions of Law, is reported in 154 F. Supp. 471 and is printed in its entirety in the *Appendix to Appellants' Brief* filed by Respondents in the Court of Appeals, nine copies of which have been filed with this Petition pursuant to Rule 21(4)

of the Rules of this Court. For the convenience of the Court that portion of the opinion of the District Court bearing upon Section 2 (d) of the Robinson-Patman Act is printed in the Appendix hereto.

## JURISDICTIONAL GROUNDS.

The judgment order of the Court of Appeals was entered on July 25, 1958 and amended by order entered on September 17, 1958, said orders being printed in the Appendix hereto. A timely petition for rehearing was filed by Defendant Suppliers, and an order denying said petition (with one judge dissenting) was entered on September 23, 1958. On that same date, the Court sitting *en banc* denied (with two judges dissenting) Defendant Suppliers' petition for rehearing *en banc*. The two orders denying said petitions are printed in the Appendix hereto. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254 (1) and under Title 28 U. S. C., Section 1651.

## QUESTIONS PRESENTED.

1. In order to establish a violation of Section 2 (d) of the Robinson-Patman Act, is it incumbent upon the Federal Trade Commission or an individual plaintiff to prove, *inter alia*, that the defendant—

   (a) had at least one other "customer",
   (b) that such other customer was "competing" with the defendant's customer who received payment for a facility promoting certain products,
   (c) that such competition was in "the distribution of such products" (the promoted products), and that
   (d) such other customer was not offered a "proportionally equal" payment;

or are the above statutory elements matters of affirmative defense as to which the burden of proof rests upon the defendant?

2. Is a supplier's payment for an advertisement of a branded product in a leading national magazine, which advertisement aids in the sales of the advertised product in all stores handling such product, a payment for the type of "services or facilities" to which the restrictions of Section 2 (d) apply, if such magazine is published by a subsidiary of a customer and sold only in that customer's stores?

3. Is a retailer a "customer" of a supplier within the meaning of Section 2 (d) if the retailer does not purchase the supplier's product from the supplier?

4. If a supplier paid one of his customers for a facility promoting a *specific* product, does Section 2 (d) require the supplier to offer proportionally equal payment (a) to those of his customers who did not handle that specific product at all, or (b) to those who at some time or times have handled the product but did not handle such product at or about the time of such promotion?

## STATUTES INVOLVED.

The statutory provisions involved are Sections 2 (d) and 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act, Title 15 U. S. C., Sections 13 (d) and 13 (e):

> "(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."
>
> "(e) That it shall be unlawful for any person to

discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

## STATEMENT OF THE CASE.

Defendant Suppliers are large companies that market various brand-name grocery products and in connection therewith engage extensively in nationally advertising these specific and distinctly identified products in various media. At various times during the period involved the Defendant Suppliers advertised *some* of their branded products in the magazine *Woman's Day*. Woman's Day, Inc. published the magazine *Woman's Day* and it and the defendant, The Great Atlantic and Pacific Tea Company (New Jersey) were wholly owned subsidiaries of The Great Atlantic and Pacific Tea Company, a Maryland corporation.

The magazine *Woman's Day* is a leading national magazine, ranking in circulation and advertising among other magazines of general circulation such as Life, Saturday Evening Post, etc., and of a content and quality comparable to and competitive with Ladies Home Journal, McCall's, Good Housekeeping, etc.

The copy for the advertisements was the same copy which Defendant Suppliers used in other national magazines and newspapers, advertising the branded product itself and making no reference to any store at which the product could be purchased, nor to the price of the product. (See typical advertisements, together with schedule of media used, reprinted in the Appendix hereto.) This advertising was placed in *Woman's Day* on the recommendation of the respective advertising agencies of Defendant Suppliers,

which recommendations were made "solely upon the evaluation by such agencies of *Woman's Day* as an effective advertising medium for the sale of the products of their respective clients to the consumer public." (Opinion of court below, App. p. 21.) The rates paid by advertisers, including Defendant Suppliers, were comparable to and competitive with those charged by magazines of national circulation. With one exception, not material here, *Woman's Day* was distributed only in A & P stores and it was placed in racks attached to the cash registers at check-out counters in the self-service stores.

Plaintiffs are twenty retail grocers and two wholesale grocers in the Chicago Metropolitan area. Pursuant to Section 4 of the Clayton Act, plaintiffs brought suit against the Defendant Suppliers, A & P, and Woman's Day, Inc., claiming that, by virtue of such advertising in *Woman's Day*, Defendant Suppliers had discriminated against them in violation of Sections 2 (a), 2 (d) and 2 (e) of the Robinson-Patman Act, that A & P and Woman's Day, Inc. had violated Section 2 (f) of that statute. The complaint also included claims under Sections 1 and 2 of the Sherman Act, but plaintiffs withdrew such claims by stipulation in the District Court.

The District Court, whose jurisdiction was invoked under the federal anti-trust laws, separated, for purposes of the trial, the issue of liability (which included the issue of "fact of damage" under Section 4 of the Clayton Act) from the question of the amount of damages. The case was tried without a jury with all of the evidence, documentary and otherwise, being stipulated by the parties.

The District Court reasoned that the advertisements of Defendant Suppliers in *Woman's Day* aided in the sale of the advertised products in *all* stores carrying such products and that any benefit to A & P from such advertisements was incidental to that accruing to Defendant Suppliers. Having

thus based its decision of non-violation on this "services or facilities" issue, the District Court did not reach the other issues under Section 2 (d) and 2 (e) of the Robinson-Patman Act, which were raised in the briefs filed before it, namely, whether plaintiffs were "customers" of Defendant Suppliers and, if so, whether they were "competing in the distribution of such products," *i. e.*, those products advertised in *Woman's Day*. Also, since the District Court held that the Robinson-Patman Act was not violated, there was no reason for it to decide the "fact of damage" issue under Section 4 of the Clayton Act or the question of whether a "spurious" class suit was properly brought pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure. (The District Court also held that Sections 2 (a) and 2 (f) were not violated, and the claims under those Sections were abandoned in the Court of Appeals.)

On appeal the court below reversed the District Court as to its holding of non-violation of Section 2 (d) but affirmed it as to its holding on Section 2 (e). Because of the withdrawal of the Sherman Act claims and the abandonment of the claims under Sections 2 (a) and 2 (f), the Court of Appeals affirmed the judgment of the District Court as to the dismissal of A & P and Woman's Day, Inc. (see footnote 5 of opinion of court below, Appendix, p. 23). As to the Defendant Suppliers, the cause was remanded to the District Court for further proceedings (a stay of mandate has been granted).

## REASONS FOR GRANTING THE WRIT.

### I.

**The Rule of Law Laid Down by the Court Below Regarding the Procedural Issue of Burden of Proof Is in Conflict With a Decision of the Court of Appeals for the Second Circuit and Decisions of the Federal Trade Commission.**

The rule laid down by the court below regarding burden of proof, if followed, would upset the procedural law applicable to every case involving Section 2 (d) or 2 (e) of the Robinson-Patman Act, whether brought by a private person or by the Federal Trade Commission. This statement of law was made in connection with the court's decision that Section 2(d) was violated by the Defendant Suppliers, the court stating that the advertising payments to Woman's Day, Inc., were unlawful—

> "unless such payment or consideration was available on proportionally equal terms to all other customers competing in the distribution of such products."

Immediately following the above paraphrase of the "unless" clause of the statute the court construed it as follows:

> "*In effect, Section 2 (d) declares as a general rule what is unlawful and, by way of exception to the rule (not as a condition thereof), provides for an escape from its applicability.* The burden is upon the party who seeks the protection of the exception, to prove that it applies to the presented facts. (Cases cited.) This language required defendant suppliers to prove in the district court that the payments for advertising or alternative appropriate benefits were available on proportionately equal terms to all customers competing with A & P in the distribution of

their said products. This they failed to do." (Emphasis added.)

Under this statement of the law on burden of proof, three important statutory elements would be matters of affirmative defense rather than elements of the plaintiff's burden of proof under Section 2 (d) of the Act. If the rule of law is correct, the Commission or private litigant could establish a *prima facie* violation simply by proving that a defendant made payments to a customer for a promotional facility. To *disprove* the fact of violation, a defendant would then have the burden of proving (1) that not one other person who handled his product (perhaps numbering in the thousands) was his "customer", or, (2) if any was his "customer", that such person was not competing with the customer who received such payment in the distribution of the advertised product at or about the time of such payment or (3) that such person was offered proportionally equal payments from the defendant. The court below thus places these statutory elements in the same category as matters of justification under Section 2 (b), *i. e.*, the affirmative defenses of cost justification and meeting competition. See *Simplicity Pattern Co., Inc.* v. *Federal Trade Commission*, 258 F. 2d 673 (Adv. Sheet No. 3, Oct. 27, 1958), (D. C. Cir.), 1958 Trade Cases, Par. 69,047. This case involves an interpretation of Section 2 (e), and is now before this Court, certiorari having been granted on both the petition and cross-petition on November 24, 1958.

The decision of the Court of Appeals in the instant case is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958), 1958 Trade Cases, Par. 69,099, on this burden of proof doctrine. In the *Atalanta* case the court said at page 369:

> "Counsel for the Commission argue that all the Commission need show is that a supplier in the general course of his business has given a promotional allowance to one customer *and not to others;* but as pointed out, *supra,* the existence of another *competing* purchaser of *a product of like grade and quality* must also be shown and proof thereof *is an essential part of the Commission's case.* (*Corn Products Refining Co.* v. *F. T. C.* (1944-45 Trade Cases, Par. 57,263), 7 Cir., 1944, 144 F. 2d 211, 219, aff'd. 324 U. S. 726." (Emphasis added.)

The opinion in the *Simplicity Pattern* case shows that the Federal Trade Commission has acknowledged that, in a Section 2 (d) case, it has the burden of proving the defendant's failure to make proportionally equal payments. In that case the court pointed out, 258 F. 2d at 677, that the Commission had adopted the decision of the hearing examiner who had said:

> "True, there is no showing of competitive injury. But this, as the examiner understands, is not required in a proceeding under Section 2 (e). Given the element of jurisdiction, it appears that a prima facie case is established when it is shown that a seller is supplying to one customer facilities for use in the resale of the seller's products, *and not supplying such facilities to the competitor of the favored customer on proportionally equal terms."* (Emphasis added.)

To the knowledge of Petitioners, no court has ever before enunciated, nor any court or commentator suggested (and, indeed, it was not so contended by the plaintiffs in the instant case) that the above three elements of Section 2 (d) were matters of affirmative defense. It is not surprising that there are so few cases on this specific issue because even a cursory analysis of the statute compels the conclusion that this burden of proof rests upon the plaintiff. It is obvious that Section 2 (d), as well as 2 (e), is directed, not against a supplier's payment to a customer for promo-

tional facilities, but rather against *discrimination;* it is equally clear that discrimination entails a *difference in treatment between two or more customers.* A *prima facie* case of discrimination under Section 2 (d), therefore, must include more than proof that *one* customer received payment from the defendant for services or facilities furnished by or through the customer in connection with the sale of a product; it must also include proof that *at least one other customer* of that defendant, competing in the sale of *that* product at or about the time of the promotion was not offered proportionally equal payments. As said by the Court of Appeals in *Simplicity Pattern:* "We may assume that had the facilities been available to the fabric stores on 'proportionally' equal terms, *there could be no discrimination* within the meaning of the section." (258 F. 2d 673, 678; emphasis added.) In other words, the "unless" clause of Section 2 (d) cannot operate as an *exception* to the discrimination proscribed therein (as stated by the court below), because failure to make proportionally equal payments to customers competing in the distribution of such product is a *sine qua non* of the discrimination proscribed.

## II.

### The Decision of the Court Below Regarding the "Services or Facilities" Issue Is Self-Contradictory and Devoid of Findings of Fact to Support It.

The District Court found at the outset that Defendant Suppliers' bona fide payments for their advertisements in *Woman's Day* did not contribute to the furnishing of the magazine itself and that the advertisements, and not the magazine, were thus the focal point of the case. Having so found, the District Court proceeded to analyze the advertisements, together with the manner of sale of the magazine and the shopping habits of grocery shoppers, in

order to determine whether they were the kind of "services or facilities" to which the restrictions of Section 2 (d) applied. The court answered this question in the negative, because it found that such advertisements did, *in fact*, aid in the sales of the advertised products in *all* stores that carried the products and that any benefit to A & P from such advertisements was incidental to that accruing to Defendant Suppliers. Since the advertisements were, therefore, inherently non-discriminatory, the District Court held that the Defendant Suppliers' advertising payments to Woman's Day, Inc., did not violate Section 2 (d). For the convenience of the Court, that portion of the District Court opinion dealing with Section 2 (d) is printed in the Appendix hereto. (As noted above, the full opinion is printed in the Appendix to Appellants' Brief nine copies of which have been filed herewith.)

The Court of Appeals found that "The service or facility involved in this case is the publication *Woman's Day*," but agreed with the District Court that payment for the advertisements in *Woman's Day* did not constitute a furnishing, or even a contribution to the furnishing, of the publication itself. Expressly rejected by the Court of Appeals was the plaintiffs' argument that, since the advertising payments defray part of the cost of the magazine, such payments are tantamount to payment for the magazine itself. The Court of Appeals' finding on this issue was definite and succinct (Appendix, p. 31):

> "In short, defendant suppliers were simply buying an advertisement from Woman's Day, Inc. They were dealing at arms' length. They paid for the advertisement which they bought."

Having agreed with the District Court that the Defendant Suppliers paid only for their advertisements and not for the magazine, it would seem obvious that, before the Court of Appeals could properly reverse the District Court as to Section 2 (d), it must find, contrary to the

finding of the District Court, that such advertisements were discriminatory. The fact is that the opinion of the Court of Appeals is completely silent as to the nature or effects of the Defendant Suppliers' advertisements in *Woman's Day*, and there is no indication whatever that the court below was in disagreement with the District Court's finding that such advertisements aided all grocers who carried the advertised products and that any benefit to A & P from such advertisements was incidental to that accruing to Defendant Suppliers. Thus the holding of the court below that Section 2-(d) was violated stands completely devoid of essential factual support.

Not only is the decision of the Court of Appeals lacking in essential factual support, but it is also self-contradictory. The contradiction occurs between the court's finding that (1) Defendant Suppliers did *not* pay for *Woman's Day*, and its implicit finding that (2) Defendant Suppliers *did* pay for *Woman's Day*. The first finding is necessarily implied from the court's statement (Appendix, p. 29) that the Defendants' payments to Woman's Day, Inc. did not even contribute to the furnishing of *Woman's Day*. ("In short; Defendant Suppliers were simply buying an advertisement from Woman's Day, Inc."—Appendix, p. 31.) The second finding is implicit in the court's decision, because the language of the statute held to be violated ("It shall be unlawful * * * to pay * * * for any service or facilities * * *") makes it a prerequisite to violation that the Defendant shall have paid for the facility involved in the case, and the court expressly found that "The service or facility involved in this case is the publication, Woman's Day." (Appendix, p. 29.) Thus it is seen that, upon analysis, the opinion of the court below contains two findings of *fact* that are completely contradictory one to the other. The entire decision of the court is thus rendered self-contradictory.

Silhouetting the fact that the opinion of the court be-

low is self-contradictory and stands without essential factual support is the court's complete ignoring of the primary issue argued before it, the issue to which the major portion of the District Court's memorandum was devoted, namely, what kind of "facilities" are covered by Sections 2 (d) and 2 (e) of the Robinson-Patman Act. None of the three points under Section 2 (d) which were discussed by the Court of Appeals (materiality of intent, burden of proof, and the requirements of satisfying the proportionality test) were the basis of the District Court's decision, and the holdings on such issues cannot logically alter the decision of the District Court if that Court was correct on the basic "facilities" question. Stripped of the discussion of the above three tangential issues, the opinion of the court below, in so far as Section 2 (d) is concerned, is contained in but a single sentence setting forth a bare legal conclusion:

> "The defendant suppliers paid, and contracted to pay, money to Woman's Day, Inc., a controlled subsidiary of A & P, for advertising in a magazine furnished by A & P in connection with the sale of products manufactured, sold, or offered for sale by said suppliers. Section 2 (d) made that transaction unlawful * * *"

In their petitions for rehearing Defendants invited the attention of the court to the deficiencies of its decision. However, although Chief Judge Duffy and Judge Finnegan voted in favor of granting a rehearing *en banc*, both the petitions for rehearing and the petitions for rehearing *en banc* were denied without comment. (Judge Finnegan, but not Chief Judge Duffy, sat on the division of the court which heard and decided the case.)

It is respectfully submitted that the "services and facilities" issue presents a question of paramount importance under Sections 2 (d) and 2 (e) and should be resolved by this Court. It is further submitted that the contradictory nature of the opinion is such that it calls for an exercise of this Court's power of supervision.

## III.

### The "Customer" Issue.

The record in the instant case shows affirmatively that none of the plaintiff retailers (with the exception of some who purchased Instant Maxwell House Coffee from General Foods Corporation at times during the period involved) purchased any of the Defendant Suppliers' products from the Defendant Suppliers, but such products as were purchased were purchased from a jobber or wholesaler. As noted above, since the District Court found that the advertisements in *Woman's Day* were not the type of facility contemplated by the statute, it was unnecessary for that Court to make any holding with respect to whether a retailer is a "customer" of a supplier within the meaning of Section 2 (d) when he does not purchase the supplier's product from the supplier but obtains it from some other source. And the District Court *did not* pass on that issue.

The Court of Appeals stated in its opinion (Appendix, p. 35) that: "It is elementary that this court, in the exercise of its appellate jurisdiction, will not pass upon any question as to which the District Court, without objection of counsel for any party, failed to make a decision. Upon a remandment to that court, counsel have a right to ask for complete rulings on such a question."

From this statement it would seem that the Court of Appeals did not intend to pass upon the question of the definition of the word "customer" in Section 2 (d) but intended to leave that question for the trial court upon remand. However, the Court of Appeals, despite the fact that no plaintiff retailer bought anything from Hunt or Morton and only some of plaintiff retailers bought anything from General Foods, held that the District Court was "in error in concluding that plaintiffs failed to prove a violation of Section 2 (d) by the defendant suppliers" (Ap-

pendix, p. 34). It appears to follow from that holding that the Court of Appeals decided that all plaintiff retailers were customers of each Defendant Supplier within the meaning of Section 2 (d). Plaintiffs contended vigorously for this interpretation of the court's finding in their answer to the petitions for rehearing (p. 9), and although this ambiguity was pointed out in Defendant Suppliers' petition for rehearing, the petition was denied without comment.

If the Court of Appeals intended to hold, as plaintiffs claim, that the word "customer" in Section 2 (d) included all those who handled a supplier's product, even though they did not purchase it from such supplier, the holding is in conflict with the decision of the Court of Appeals for the Third Circuit in *Klein* v. *Lionel Corp.* (237 F. 2d 13, 1956). Although that case arose under Section 2 (a) of the Act, the issue thereunder is identical inasmuch as both Section 2 (a) and Section 2 (d) have to do with discrimination as between two or more purchasers from the same seller. The Third Circuit held that, even though "fair trade" price control was exercised by the defendant over the plaintiff's resale prices (which was not true in the instant case), the plaintiff, who purchased the defendant's products through a jobber, was not covered by the provisions of the statute (237 F. 2d at 15):

> "Klein did purchase Lionel products but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein, therefore, can claim no protection under the Act as a direct purchaser."

In the *Atalanta* case, the court said: "All that the Act requires is that a seller give fair and equal treatment to all those *to whom he elects to sell products* of like grade and quality." (258 F. 2d at 373; emphasis added.)

In Senate Committee Report No. 1502 (74th Cong., 2d Sess., Feb. 3, 1936), it is stated in the analysis of the bill:

"The bill proposed to amend Section 2 of the Clayton Act so as to suppress more effectually discriminations *between customers of the same seller* • • •." (Emphasis added.)

House Committee Report No. 2287 (74th Cong., 2d Sess. March 31, 1936) was to the same effect.

It is submitted that the question of what persons are "purchasers" or "customers" of a supplier for purposes of the Robinson-Patman Act is a recurring question of importance under the federal anti-trust laws and one that should be resolved by this Court.

## IV.

## The Issues Involved in the Statutory Phrase "Competing in the Distribution of Such Products."

It is possible that the court below did not intend to hold that the burden of proving the non-existence of "• • • other customers competing in the distribution of such products • • •" was upon a defendant, but merely intended to hold that, after the elements inherent in the above statutory phrase are established, the burden of proving proportionally equal payments to such other customers was upon the defendant. While, if this interpretation is correct, it reduces the number of errors in the Court of Appeals' broad statement as to the procedural matter of burden of proof from three errors* to one, it would nevertheless necessarily show a serious conflict in *substantive* law between this Court of Appeals and the Second Circuit. This substantive issue has to do with the questions of whether the competition between a plaintiff and a defendant's "favored" customer must be with respect to the specific products promoted by

* See discussion under I above.

the supplier, and whether such competition must also be at or about the time of such promotion.*

The record failed to show that any plaintiff competed with A & P in the distribution of any Hunt product that was advertised in *Woman's Day*, and, with the exception noted below,** it failed to show that any plaintiff ever competed with A & P in the distribution of any General Foods product that was ever advertised in *Woman's Day*. Much less does the record show that any product of General Foods or Hunt that was advertised in *Woman's Day* was carried by plaintiffs at or about the time that it was so advertised. Thus, as far as the record in this case is concerned, plaintiffs may have been basing their claim of discrimination on the fact that they were handling, for example, Gaines Dog Food (a General Foods product which was never advertised in *Woman's Day*) at the time that General Foods was advertising Birds Eye Frozen Orange Juice in *Woman's Day*—even though plaintiffs may have been carrying a competitor's brand of frozen orange juice rather than Birds Eye during this same period. Therefore, unless the Court of Appeals intended to remand these issues for determination by the District Court, it necessarily follows that the court's reversal of the case as against all Defendant Suppliers constitutes a holding that (1) the word "such" in the statutory phrase "competing in the

* The question here is whether there was competition between a plaintiff retailer and an A & P store with respect to a particular branded product of a Defendant Supplier at or about the time of the advertising of that product in *Woman's Day*. The stipulation of the parties (*Pls.' Appendix, p. 58*) was limited to the fact that each plaintiff's *store* was in competition with an A & P store in the sense that both *stores* were seeking to gain the trade of at least one customer.

** Some plaintiff retailers purchased Instant Maxwell House Coffee from General Foods at some time or times during the period involved, but the record fails to show that any of them were handling it during March 1954, which was the only time during the period involved in this suit that it was advertised in *Woman's Day*.

distribution of *such* products," is meaningless, and (2) that the time of competition with the favored customer need not relate to the time of the defendant's promotion of its product.

This holding is in direct conflict with the Second Circuit in the *Atalanta* case where both of these issues were involved. With respect to the specific product issue, the court there held that the supplier's other customers were not entitled to proportionally equal payments unless they were competing in the distribution of products "of like grade and quality" with those being promoted by the supplier. Expressly rejected by the court was the contention of the Federal Trade Commission that all customers were covered by the statute, the court saying (258 F. 2d at 370):

> "* * * To adopt the Commission's argument would be tantamount to striking out from Section 2 (d) the qualifying phrase 'competing in the distribution of such products or commodities' and overruling the prior decisions holding that 'such products' mean products of like grade and quality."

In that case the court in its opinion also emphasized the importance of the time element, and in footnote 6 (258 F. 2d at 372) said:

> "Prior to the decision under review, the Commission itself recognized that the sales to the unfavored customer must occur within the same approximate time period as the sales to the favored customer. Thus in *Kay Windsor Frocks, Inc.*, 1954, 51 F. T. C. 89, the Commission was careful to demonstrate that a substantial amount of the dress sales to Franklin Simon on which advertising allowances were given actually occurred within the same period as the sales to R. H. Macy & Co., which received no such allowances."

The importance of the specific product issue and the time element issue is such that they should be passed on by this Court.

## CONCLUSION.

For each of the foregoing reasons, we earnestly urge that this Petition be granted and that this Court's writ of certiorari issue to the Court of Appeals for the Seventh Circuit to review its decision in the instant case.

Respectfully submitted,

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# APPENDIX.

## OPINION OF COURT OF APPEALS.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

No. 12178 September Term, 1957 April Session, 1958.

STATE WHOLESALE GROCERS, an Illinois corporation, et al.,
*Plaintiffs-Appellants,*
v.
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, a New Jersey corporation, et al.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 25, 1958

As amended September 17, 1958.

(Rehearing denied September 23, 1958.)
(Rehearing *en banc* denied September 23, 1958.)

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* State Wholesale Grocers and Zeigmund Wholesale Grocery Co., Inc., Illinois corporations (hereinafter referred to as plaintiff wholesalers), and a group of individual store retailers of

grocery products and other related products (hereinafter referred to as plaintiff retailers), all engaged in business in the Metropolitan Area of Chicago, Illinois, sued in a class suit[1] in the district court for treble damages and for injunctive relief under the Clayton Act, as amended by the Robinson-Patman Act.[2] The case was tried without a jury upon the issue of liability, the court having for the purposes of trial, separated that issue from the issue of damages. Judgment was entered in favor of defendants and the cause was dismissed. Plaintiffs have appealed. They rely on the district court's alleged error in misconstruing and misapplying said act, primarily §§ 2(d) and 2(e) thereof.[3]

As a result of a commendable cooperation in which the district judge and counsel for all parties joined, all of the evidence, documentary and otherwise, was stipulated, reserving to each party the right to argue the materiality or relevancy thereof.

There is no significant dispute as to the basic facts pertinent to the decision. We are thus not confronted here with the provision of Federal Rules of Civil Procedure, 52 (a), that findings of fact shall not be set aside unless clearly erroneous. *United States* v. *E. I. du Pont & Co.*, 353 U.S. 586, 598, note 28.

The district court made 183 findings of fact and 18 conclusions of law, which are set forth as a part of its published opinion.[4]

While in the district court the issue of liability involved §§ 2(a), 2(d), 2(e) and 2(f) of the Clayton Act, on appeal

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1. Pursuant to 28 U.S.C.A. rule 23.
2. 15 U.S.C.A. §§ 12-27.
3. 15 U.S.C.A. 13 (d) and 13 (e).
4. 154 F. Supp. 471, 485, 506.

plaintiffs in effect have concentrated upon only §§ 2(d) and 2(e). [5]

The facts below set forth are established by the record. They include certain facts, *inter alia*, which we have found contrary to some found by the district court.

Defendant, The Great Atlantic and Pacific Tea Company, a New Jersey corporation, herein referred to as A & P, is a retail chain enterprise operating over 200 stores throughout the Metropolitan Area of Chicago with approximately 126 stores located in that city. It handles grocery products, in varying percentages of its gross sales. There are other retail groceries and wholesale grocers in the Area. Each plaintiff wholesaler sells to independent retail grocery stores which are in competition with A & P.

Defendants General Foods Corporation, Morton Salt Company and Hunt Foods, Inc., are corporate suppliers of grocery products in the United States whose brands of products are nationally known by their names and accepted by the consuming public. They are hereinafter referred to some times as "suppliers" or "defendant suppliers." At all times pertinent herein some of the products of each of the suppliers was handled and sold by the A & P stores, plaintiff retailers, plaintiff wholesalers, and other retail groceries and wholesale grocers in the Area.

Defendant Woman's Day, Inc., is a New York corporation, all of the capital stock of which is held by The Great Atlantic and Pacific Tea Company, a Maryland corporation. [6]

---

5. This amounts to an abandonment by plaintiffs of reliance upon §§ 2 (a) and 2 (f). Moreover, by stipulations in the district court, plaintiffs withdrew any claims under the Sherman Act. 15 U.S.C.A. §§ 1 and 2. Therefore, insofar as the foregoing sections are concerned, we are required to affirm the judgment of the district court in favor of defendants A & P and Woman's Day, Inc.

6. Defendant A & P is a wholly owned and controlled subsidiary of the Maryland corporation.

Woman's Day is a magazine published, since 1949, by Woman's Day, Inc. It ranks in circulation and advertising among the leading national magazines, such as Life, Saturday Evening Post and Better Homes & Gardens, was the recipient of national awards for editorial, art and homemaking accomplishments, and is of content and quality comparable to and competitive with the well-known Good Housekeeping, Ladies' Home Journal, McCall's, Woman's Home Companion, and Household magazines. The cost per single copy for printing, publishing and distributing Woman's Day varied from approximately 17¢ to 21¢ during 1954, 1955, and 1956. It has been selling for 7¢ since 1951[7] (having originally been given away free), whereas Good Housekeeping, Ladies' Home Journal, McCall's and Woman's Home Companion sell on the newsstands for 35¢ per single copy. These latter magazines are obtainable at newsstands, drug stores, grocery stores, department stores and other sources as well as by subscription. Woman's Day is and always was obtainable only at A & P stores. It cannot be purchased by subscription, nor can it be purchased at a newsstand (except in Colorado where only about .4% of each issue is distributed and where A & P has no retail stores), drug store, other grocery store, department store or from other sources.

Since its inception Woman's Day has been identified as the A & P magazine. Since 1953, the cover of the magazine has carried the words "The A & P Magazine." It is actively promoted for sale by the use of all types of internal and external media, including other magazines, newspapers, radio and television. All of its food advertising is of products sold in A & P stores. However, there is no other significant relationship between A & P's handling of a supplier's food products and the advertising thereof in Woman's Day. That magazine also advertises

7. Until this suit was filed.

the food products manufactured by A & P through its subsidiaries and sold only in A & P stores.

Woman's Day is an effective medium for the advertisement of the A & P stores in general. It creates good will among the customers of A & P. It attracts new customers for A & P and keeps its old ones. It sells approximately 42 million copies a year. It is a promotional operation of A & P. It exists solely for competitive benefit to A & P's retail stores.

The annual cost of producing Woman's Day exceeds $9,000,000. Less than one-quarter of this cost is recovered through the sale of copies. The remainder is received from the sale of advertising space. This advertising revenue is received from suppliers and non-suppliers. Supplier advertisers are manufacturers whose products are sold in A & P stores, such as the three defendant suppliers. In 1954, 73.3% of the advertising revenue, or $6,905,021; and in 1955, 65.5% or $6,073,693, was received from supplier advertisers.

The number of Woman's Day advertisers in each class and the gross advertising revenue derived from each class in 1954 and 1955 were as follows:

Advertisers in Woman's Day

| | | |
|---|---|---|
| *1954* | | |
| Suppliers | 203 | 49.3% |
| Non-suppliers | 209 | 50.7% |
| Total | 412 | 100% |
| *1955* | | |
| Suppliers | 172 | 47.6% |
| Non-suppliers | 189 | 52.4% |
| Total | 361 | 100% |

Revenue to Woman's Day from:

*1954*

| | | |
|---|---|---|
| Suppliers | $6,905,021 | 73.3% |
| Non-suppliers | 2,508,822 | 26.7% |
| Total | $9,413,843 | 100% |

*1955*

| | | |
|---|---|---|
| Suppliers | $6,073,693 | 65.5% |
| Non-suppliers | 3,205,488 | 34.5% |
| | $9,279,181 | 100% |

None of the plaintiff retailers or wholesalers owned or published a magazine of any kind. For certain periods covered by the complaint in this case, some of the plaintiff retailers carried a store distributed magazine, while others did not. Since May of 1956 no store distributed magazine has been available in the Area to any independent retailers or wholesalers, and since June of 1954 only one such magazine was on the market for handling by some independent retailers who were members of a particular cooperative purchasing group. It was known as Better Living and it ceased publication in May 1956. These facts were known to the defendant suppliers. Defendant suppliers from time to time advertised in the store distributed magazines in addition to Woman's Day.

Woman's Day is shipped by Woman's Day, Inc. to various Unit warehouses of A & P, from which the magazine is delivered by truck, with rare exceptions, to the individual A & P retail stores.

All A & P self-service stores are supplied with cash register racks to hold the copies of Woman's Day on sale. These racks are attached to the cash register at the check-out counters.

About 14,000 copies are sold each month in the State of Colorado by an independent distributor. Since February, 1951 the retail price has been 15¢.

Advertising of A & P and its subsidiaries and divisions in Woman's Day, is placed through Paris & Peart, Inc., New York City, an advertising agency. The latter is an independent agency which also represents clients, other than A & P and its subsidiaries.

The sale of advertising space in Woman's Day is pursuant to contracts between Woman's Day, Inc. and the advertising agency representing the advertiser. That advertising agency pays Woman's Day, Inc. the established advertising rate for the space purchased, less the customary agency commission of 15%, and collects from the advertiser the full charge for the space purchased. It is the general practice for the advertising agency, often after consultation with representatives of the advertiser, to recommend the media to its client. When Woman's Day is recommended, it is solely upon the evaluation by such agencies of Woman's Day as an effective advertising medium for the sale of the products of their respective clients to the consumer public. The advertising rates charged by Woman's Day, Inc. to Paris & Peart, Inc. for advertising placed in Woman's Day in behalf of A & P are the same as are charged by Woman's Day, Inc. to all other advertisers. Many nationally recognized advertising agencies have for years placed advertising in Woman's Day in behalf of their clients.

The rates paid by advertisers in Woman's Day are comparable to and competitive with those charged by magazines of comparable national circulation. Such advertising rates for 1956 were based upon a guarantee of a net paid advertising circulation of $3,375,000 during the calendar year. Certifications of circulation were made periodically by the Audit Bureau of Circulations, of which Woman's

Day, Inc. is a member. When in any given period Woman's Day, Inc. failed to deliver the circulation it had guaranteed its advertisers, it thereupon, pursuant to contract, made an adjustment to all of its advertisers. Such an adjustment is standard practice in the publishing business. The actual payments for such adjustments were made by Woman's Day, Inc. to the advertising agencies for the accounts of their respective clients.[8]

Woman's Day, Inc. has never given any refunds, rebates, credits, gratuities or allowances to A & P or any of its subsidiaries or divisions, with the exception of the circulation billing adjustments given to all advertisers.

At the time of the initial placement and on the occasion of each subsequent placement of advertising in behalf of defendant suppliers in Woman's Day, they were then selling, and had for some time prior thereto sold, products to A & P for resale through A & P retail stores.

The defendant suppliers have also advertised various of their products from time to time in other magazines of general circulation, such as Family Circle, Western Family, Everywoman's, American Family, Better Living, Good Housekeeping, Household, Ladies' Home Journal, Life, Saturday Evening Post, Colliers, Better Homes & Gardens, and Woman's Home Companion.

Typical manufacturers, advertising in Woman's Day and whose products are not sold in any A & P store, are the following:

| | |
|---|---|
| Armstrong Cork Company | Floor coverings |
| General Electric Co. | Refrigerators |
| Spiegel, Inc. | Mail order |
| Olson Rug Co. | Rugs |

8. During the calendar year 1955, Woman's Day, Inc. was unable to meet the guaranteed paid average circulation of 3,750,000 specified in its national rate card as the basis for its advertising rates, the average for that year being 3,500,000. It refunded 6.86% of its total advertising revenue for 1955.

| | |
|---|---|
| Zenith Radio Corp. | Hearing aids |
| Toni Company | Home permanents |
| RKO Radio Pictures, Inc. | Motion pictures |

The following manufacturers are typical of those (in addition to defendant suppliers), advertising in Woman's Day and whose products are sold in A & P stores:

| | |
|---|---|
| American Tobacco Co. | Cigarettes |
| The Borden Co. | Cheese and milk |
| Harold H. Clapp | Baby food |
| General Mills, Inc. | Flour and cereals |
| H. J. Heinz Co. | Baby food and soups |
| Quaker Oats Co. | Cereals and dog food |
| Swift and Company | Meat products |
| William Wrigley Co. | Chewing gum |

1. The essentially relevant language of § 2(e) is:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity * * * by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities * * *."

The service or facility involved in this case is the publication Woman's Day. We find from the record before us that there is an absence of any evidence that defendant suppliers furnished or contracted to furnish, or contributed to the furnishing of, this publication. We are aware that the annual cost of producing the magazine exceeded $9,000,000 and that the revenue recovered from the sale of advertising space therein was equal to three quarters of that amount. We are further aware that in 1954, of the advertising revenue thus received, about 73% thereof was received from supplier advertisers, as against about 26% received from non-supplier advertisers, and that in 1955 the corresponding percentages were about 65% from suppliers and about 34% from non-suppliers:

Plaintiffs argue that what they urge is a violation of

§ 2(e) is not "made less so because the payment of the supplier is for advertising within the magazine, for the consequence thereof is that such payments pay a part of the cost of the magazine which A & P does not therefore have to pay. It is the absorption of the favored customer's costs which violates the Sections, and this is done whether or not those costs are paid by the supplier in exchange for advertising space." However, even if these conclusions of plaintiffs are factually correct, they do not embody the test set forth in § 2(e), which requires that plaintiffs prove that defendant suppliers furnished or contracted to furnish or contributed to furnishing of the magazine in question. While a passenger upon a railroad, when he pays his fare, may pompously remind a conductor that he is contributing to the payment of the conductor's salary, the transaction actually is not a traceable contribution to any one specific item of the railroad's expenditures for operation. The fare becomes commingled with other revenue of the carrier and, although it augments the mass of gross revenue from which the salaries of employees and other expenses are paid, it cannot sensibly be said that any one passenger is furnishing or contributing to the salary of any one employee. If a contrary interpretation of such a transaction were intended by Congress to be applied to the payment of advertising charges by an advertiser in a magazine, to the end that each dollar paid by the advertiser on its bill for advertising therein should be considered the furnishing or contributing to the furnishing of the publication itself, Congress would have used language expressing such an intent.

The pertinent facts in this case reveal the correctness of the aforesaid conclusion. The placing by the suppliers' advertising agencies of advertisements in Woman's Day was not concurrent with the beginning, or with the ending of A & P stores' handling of each supplier's products on

its shelves. The advertising charges paid by these suppliers were computed according to the same method used in fixing the charges to be paid by all advertisers in that publication. Defendant suppliers in no way dictated the editorial or other policies of Woman's Day. They did not manage or control the operation thereof. They did not have anything to do with the printing of the magazine or the furnishing of any paper or materials used in the magazine's publication. In short, defendant suppliers were simply buying an advertisement from Woman's Day, Inc. They were dealing at arms' length. They paid for the advertisement which they bought. They were not furnishing or contributing to the furnishing of any part of the production of the magazine. That production was exclusively a function of Woman's Day, Inc.

We, therefore, hold that the district court was correct in concluding that plaintiffs failed to prove a violation of § 2(e).

2. The essentially relevant language of § 2(d) is:

> "It shall be unlawful for any person * * * to pay or contract for the payment of anything of value to or for the benefit of a customer of such person * * * for any services or facilities furnished by or through such customer in connection with the * * * sale, * * * of any products * * * sold, * * * by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products * * *."

Here is a rigid definition of acts constituting "unlawfulness". The *fact* of paying or contracting for the payment for the services or facilities referred to is proscribed, subject to the exception contained in the clause commencing "unless". It is apparent that Congress has not made relevant the motive or intent of him who thus pays or contracts to pay. *United States* v. *E. I. du Pont*, 353 U. S. 586,

607. We believe that the district court erred in relying upon the fact that it found that there was no evidence of any ulterior *motive* on the part of defendant suppliers in advertising in Woman's Day nor that said suppliers had *intended* to favor A & P over other customers. 154 F. Supp. at 477.

The defendant suppliers paid, and contracted to pay, money to Woman's Day, Inc., a controlled subsidiary of A & P, for advertising in a magazine furnished by A & P in connection with the sale of products manufactured, sold, or offered for sale by said suppliers. § 2(d) made that transaction unlawful, unless such payment or consideration was available on proportionally equal terms to all other customers competing in the distribution of such products. In effect, § 2(d) declares as a general rule what is unlawful and, by way of exception[9] to the rule (not as a condition thereof), provides for an escape from its applicability. The burden is upon the party who seeks the protection of the exception, to prove that it applies to the presented facts. *Canadian Pac. Ry. Co.* v. *United States*, 73 F. 2d 831, 834; *Basham Co.* v. *Lucas*, 21 F. 2d 550, 551, affirmed 30 F. 2d 97; see also *United States* v. *Dickson*, 40 U. S. 141, 10 L. Ed. 689. Cf. *Harvey L. Velde, Trustee, etc.* v. *Ezra Rumbold*, 256 F. 2d 163. This language required defendant suppliers to prove in the district court that the payments for advertising or alternative appropriate benefits were available on proportionately equal terms to all customers competing with A & P in the distribution of their said products. This they failed to do.

In *Elizabeth Arden Sales Corp.* v. *Gus Blass*, 150 F. 2d 988, 994, the court utilized the language of the Federal Trade Commission when it said, at 994:

"* * * The furnishing of a service or facility which

9. "Unless" means "except". Webster's New International Dictionary (1957) 2d ed.

> cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms.' "[10]

The district court relied on the fact that "none of the plaintiffs offers for sale a store magazine as apparently no such magazine is available for their distribution. * * The question arises, therefore, whether the Act is violated if the one purchaser is unable to furnish a service which that purchaser's competitor furnishes and for which the common supplier makes payment. * * *": That court said:

> "In the instant case the plaintiffs do not publish or sell a store distributed magazine and, thus, they are unable and unequipped to render or furnish the services for which payment would be made and for which the defendant suppliers in this case pay Woman's Day. Being so unable to furnish these services, plaintiffs have no standing to complain about the defendant suppliers' advertising in Woman's Day even if it were assumed that these payments violated the Act. * * *"

Both sides in this case cite parts of the Report of the Attorney General's National Committee to Study the Antitrust Laws, of March 31, 1955. On page 189 of the report, it is said:

> "The criterion of 'proportionally equal terms' in Sections 2(d) and 2(e) has recently been construed by the Federal Trade Commission. In the recent Trade Practice Rules for the Cosmetics Industry and its opinion in the *Soap* cases, the Commission has evolved a rule of thumb for testing the requisite pro-

10. While the court was referring to a case before the Federal Trade Commission involving § 2(e), the quoted language is also applicable to § 2(d).

portional equality in allowances or services by comparing the promotional benefit with the dollar volume of purchases by various customers. In actual practice, promotional programs can thus conform to the law in three basic ways: (1) payment of a dollar allowance per unit of promotional service rendered by each buyer, up to a uniform maximum percentage of his dollar volume; (2) a simplified plan, granting each buyer a set dollar allowance per unit of merchandise bought, on condition that *he* perform a specified minimum quantum of promotional services; (3) the *seller's* direct furnishing of promotional services to the buyer, worth a uniform percentage of each buyer's volume. The Commission's recent clarification of 2(d) and 2(e) also recognized that not all customers entitled to participation in a seller's promotional plan can effectively utilize each type of promotional service tendered, or perform that form of service which the seller desires to reward with an allowance under his plan. However, to ensure appropriate benefits to all qualified customers, the Commission expects the seller to offer *bona fide* alternative means enabling all buyers to participate in some form. In that event, a reasonable relationship among the several available types of service or allowance must be maintained, though the *rate* of compensation for different forms of service may vary. In this way, the statutory standard of proportional equality has been translated by the Commission into workable rules of law."

In determining the proportionally equal terms upon which a seller shall make available any payment or consideration referred to in § 2(d), the Act requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him.

We, therefore, hold that the district court was in error in concluding that plaintiffs failed to prove a violation of § 2(d) by defendant suppliers.

3. Defendants argue in this court that plaintiffs have failed to prove injury or "the fact of damage", as required by § 4 of the Clayton Act.[11]

Plaintiffs' counsel point out that the district court considered only the issue of defendants' liability under the Clayton Act and did not consider whether plaintiffs had established the "fact of damage or injury" under § 4. From an inspection of the record before us, we find that the latter statement is correct. We also find that, not only did the district court separate the "issue of liability" from the "issue of damages", *ante 1*, but also that no objection appears to have been made to said action by any party hereto, either in the district court or in this court. The record does not show that the district court at any time made, or was asked to make, any finding of fact or conclusion of law, involving or resolving the issue of injury to the business or property of plaintiffs or their damages.[12]

It is elementary that this court, in the exercise of its appellate jurisdiction, will not pass upon any question as to which the district court, without objection of counsel for any party, failed to make a decision. Upon a remandment to that court, counsel have a right to ask for complete rulings on such a question.

4. Defendant suppliers make in this court a contention that plaintiffs have not shown that they are entitled to bring a class suit. The record reveals that the district court did not rule upon this contention. Upon a remandment it should do so.

For the reasons herein set forth, the judgment of the district court in favor of defendants A & P and Woman's Day, Inc, is affirmed, and, as to defendant suppliers, said

11. 15 U.S.C.A. 15.

12. The court made only a limited entry into this field. See findings of fact 171-174 and 176.

judgment is reversed and, as to said defendant suppliers, this cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

Judgment in Part Affirmed and in Part Reversed and Remanded With Instructions.

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FINNEGAN, *Circuit Judge.* I am unable to agree with all that is said by Judge Schnackenberg in his opinion, and I differ with the majority in their disposition of this appeal.

## JUDGMENT ORDERS.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Friday, July 25, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

| | |
|---|---|
| State Wholesale Grocers, an Ill. corporation, *et al.*, *Plaintiffs-Appellants,* *vs.* The Great Atlantic & Pacific Tea Company, *et al.*, *Defendants-Appellees.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| No. 12178 | |

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause in favor of defendant, The Great Atlantic and Pacific Tea Company is affirmed, and, as to defendant suppliers, said judgment is reversed, and, as to said defendant suppliers, this cause is remanded to the said District Court

for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

It is further ordered that each party to this appeal is taxed with its own costs in this Court, with the exception that one-half (½) of the costs of printing the appendix to appellant's brief is taxed against the appellees, General Foods Corporation, Morton Salt Company and Hunt Foods, Inc. and the other one-half (½) is taxed against the appellants.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, September 17, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

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State Wholesale Grocers, an Illinois corporation, *et al.*,
*Plaintiffs-Appellants,*
*vs.*
The Great Atlantic and Pacific Tea Company, a New Jersey corporation, *et al.*,
*Defendants-Appellees.*

No. 12178

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the judgment entered by this Court on July 25, 1958 be amended to read as follows:

"Friday, July 25, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

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| | |
|---|---|
| "State Wholesale Grocers, an Illinois corporation, *et al.*, *Plaintiffs-Appellants*, vs. The Great Atlantic and Pacific Tea Company, a New Jersey corporation, *et al.*, *Defendants-Appellees.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

No. 12178

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"This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

"On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause in favor of defendants The Great Atlantic and Pacific Tea Company and Woman's Day, Inc. is affirmed, and, as to defendant suppliers, said judgment is reversed, and, as to said defendant suppliers, this cause is remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court filed this day.

"It is further ordered that each party to this appeal is taxed with its own costs in this Court, with the exception that one-half (½) of the costs of printing the appendix to appellants' brief is taxed against the appellees, General Foods Corporation, Morton Salt Company and Hunt Foods, Inc., and the other one-half (½) thereof is taxed against appellants."

## ORDERS DENYING PETITIONS FOR REHEARING

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, September 23, 1958.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. John S. Hastings, Circuit Judge.
Hon. W. Lynn Parkinson, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

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State Wholesale Grocers, *et al.*,
*Plaintiffs-Appellants,*
No. 12178 *vs.*
The Great Atlantic & Pacific Tea Company, *et al.*,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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It is ordered by the Court, en banc, that the petitions for a rehearing en banc filed herein on August 22, 1958 and August 25, 1958 be, and the same is hereby, DENIED.

Chief Judge Duffy and Judge Finnegan voted in favor of granting said petitions for a rehearing en banc.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Tuesday, September 23, 1958.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.

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| | |
|---|---|
| State Wholesale Grocers, *et al.*; *Plaintiffs-Appellants*, vs. The Great Atlantic & Pacific Tea Company, *et al.*, *Defendants-Appellees*. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| No. 12178 | |

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It is ordered by the Court that the petitions for a rehearing filed herein on August 22, 1958 and August 25, 1958 be, and the same are hereby, DENIED.

FINNEGAN, *C. J.* "I would allow the petitions for rehearing."

## THAT PART OF DISTRICT COURT OPINION RELATING TO THE SECTION 2 (d) ISSUE.

### The Section 2(d) Issue.

In discussing Section 2(d), it becomes necessary to examine the methods employed by each of the Defendant Suppliers in determining the medium in which each should advertise and particularly whether each should advertise in *Woman's Day* magazine.

### General Foods.

General Foods is a large food merchandising company which handles more than 50 different grocery store products. In its 1956 fiscal year it sold $759,200,000 worth of grocery products and spent more than $75,180,000 in advertising them.

General Foods is comprised of eleven operating divisions.

The marketing function of each division selling grocery store products is in charge of a marketing manager who is responsible for the advertising and selling of all the products of that division. Reporting to the marketing manager are the product group managers or the particular product managers. Product group managers and product managers are responsible for the development and execution of marketing plans, including advertising plans, for the specific products assigned to them. Both the initial and final decision on the contents of a marketing plan are made by the product group manager or product manager, subject to the approval of his superiors. The responsibility of selecting and recommending the specific advertising media within the framework of the marketing plan rests

with the particular advertising agency retained by the company.

In determining what medium should be used to advertise a particular product (whether magazines, newspapers, outdoor posters, car cards, radio or television), General Foods' advertising agencies take many factors into consideration. These factors include the stated objectives of the advertising program; the nature and strength of the competition; who are the prospective purchasers of the products—i. e., men, women, children, age, income bracket, educational level; the locality where these prospects live—i. e., in small towns and rural communities, in cities, in metropolitan centers, in which geographical areas of the country; and the distribution pattern of the particular product.

If the agency retained by General Foods determines that an advertising effort or part of any advertising effort should be through magazines, the selection of the magazines, or of a particular magazine, requires the weighing of many considerations, such as circulation, geographical distribution of readers, cost per thousand circulation, number of readers for each copy, characteristics of the magazine and its readers, education and income level of the magazine's audience, the prestige of the magazine, and the nature and quality of its editorial material.

Applying these general considerations to the case at bar, it has been stipulated that the criteria considered by General Foods in determining whether or not *Woman's Day* was to be included in a media schedule for a particular product were the same criteria that were considered by General Foods in the selection of any other magazine or medium.

Hunt Foods.

Hunt Foods is a large food merchandising company which handles more than 15 different grocery store prod-

ucts. In its 1955 fiscal year Hunt sold $85,558,310 worth of grocery products and spent $5,741,000 advertising them. Hunt's advertising program is prepared by its advertising department in consultation with the particular advertising agency retained by it.

Hunt considers many criteria and factors in selecting publications in which to advertise its products. Among these factors are the publication's circulation, and all aspects thereof including not only the total figure but also the pattern of this circulation by geographical areas. Hunt also considers the cost of using the publication, and specifically, the base page rate and quantity and frequency discounts. Another criterion that Hunt considers is the audience statistics such as the relation of men to women readers and how large the total audience becomes as a result of secondary and pass-along readership. Hunt also considers the editorial policies of the publication and its mechanical quality, such as the process by which it is printed and the quality and size of its paper. Hunt gives primary consideration to an adequate "national" advertising program using media whose circulation figures bear a proper relationship to the national population pattern. After providing for national coverage, Hunt then considers those media which have a more regional than national influence.

The extent of Hunt's advertising in any particular medium is determined by the amount of money which can be allocated to advertising in a given period and by selecting the medium that it feels best reaches the potential customers of its products and also best serves its designated purposes.

In deciding to advertise in *Woman's Day* magazine, Hunt has used and considered the same factors and criteria which it considered in determining to advertise in any other publication.

Morton Salt Company.

Morton Salt is a substantial producer of various salt products. In 1955 Morton sold $7,327,672 worth of salt products and spent $2,342,619 in advertising them. Morton's advertising program is the result of consultations and deliberations between Morton's advertising agency and Morton's advertising department.

In determining whether to advertise in a particular publication, Morton considers that publication's total circulation; its cost per thousand circulation; its gross cost; the characteristics of the publication's readers according to age, education, etc.; the publication's geographical circulation and circulation in terms of population density both as compared with Morton's sales and total grocery store sales; and, finally, Morton also considers the quality of the printing reproduction. In deciding to advertise in *Woman's Day* Morton has been guided by the same factors that it considered in determining to advertise in any magazine.

In summation, viewing the processes which the Defendant Suppliers utilized in choosing to advertise in *Woman's Day* magazine, the evidence is clear that these defendants chose to advertise in *Woman's Day* after having weighed the same criteria that they considered before advertising in any medium and, more specifically, in any magazine. *Woman's Day* magazine met the test to which each of the Defendant Suppliers placed any magazine, passed it, and, as a consequence, each of the Defendant Suppliers placed their advertisements therein. Thus, there is no evidence of any ulterior motive on the part of the Defendant Suppliers in advertising in *Woman's Day* nor does it appear that the Defendant Suppliers had intended to favor A&P (New Jersey) over any of its other customers. It is also interesting to note that it has been stipulated that the ex-

tent to which A&P promotes or merchandises the products of its suppliers is and has been in no way affected by the fact that such suppliers do or do not advertise in *Woman's Day* or by the extent of such advertising if there is any. Additionally, the evidence also reveals, through the testimony of Harry B. George, National Director of Purchases of A&P, that whether manufacturers or processors of grocery store products do or do not advertise in *Woman's Day* is never considered in any manner by A&P in deciding whether, or to what extent, to purchase their products for resale in A&P retail stores. George also testified that the advertising in *Woman's Day* by such manufacturers or processors has no effect on the prices paid by A&P for products purchased for resale in A&P retail stores. Plaintiffs, however, attach no significance to this evidence, which they do not dispute, but argue that, nonetheless, the Act has been violated, if equal payments have not been afforded to them.

Nor do the plaintiffs attach any significance to the evidence which clearly reveals that the Defendant Suppliers receive full value for their payments for their advertisements in *Woman's Day*. *Woman's Day* is, admittedly, a high quality magazine enjoying a substantial circulation. This fact, when considered with the fact that the advertising rates charged by Woman's Day, Inc. to all advertisers in *Woman's Day*, including the Defendant Suppliers, for advertisements in said magazine are comparable to and competitive with the rates charged and prices paid per thousand circulation in magazines of comparable national circulation, makes the conclusion inescapable that the Defendant Suppliers receive full value for their advertisements in *Woman's Day*. Plaintiffs do not contend otherwise but argue that whether the Defendant Suppliers receive full value is immaterial in view of the fact that like payments by the Defendant Suppliers were not made available to the plaintiffs on proportionally equal terms.

In support of their position, plaintiffs cite a passage from Congressman Utterbach's speech which was given just before the adoption of the Act. Congressman Utterbach stated:

> "The existing evil • • • is, of course, the grant for discriminations under the guise of payments for • • • services which, *whether or not* • • • *actually rendered as agreed*, result in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves." (emphasis, plaintiffs) 80 Cong. Rec. 9418.

Plaintiffs emphasize the words, "whether or not • • • actually rendered as agreed," as indicating that it does not matter that the supplier receives value for his payments for such "services." This reasoning, however, is clearly untenable for it is manifest that Congressman Utterbach was speaking there of services which, of their very nature, were designed primarily to benefit the customer. Thus, if the service paid for is designed primarily to benefit the customer then it matters little if the services are rendered or not—on the one hand, the customer is benefited by the services which the supplier pays for, and on the other hand, the customer, instead of having the services performed, is benefited by keeping the money given him by the supplier. Either way, the customer is benefited and the Act is violated if the service to be rendered is designed primarily to benefit the customer.

Thus, in the Senate and House Committee Reports, it is stated:

> "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services, which the customers agree to render with reference to the seller's products, or sometimes with reference to his

business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the *customer is deriving* from it *equal benefit* to *his own business* and *is thus enabled to shift to his vendor substantial portions of his own advertising cost* while his smaller competitor, unable to command such allowances, cannot do so." (emphasis added) Senate Report No. 1502, p. 7; House Report No. 2287, p. 15; 74th Cong. 2d Sess. 1936.

It is apparent, therefore, from a study of this section, as well as from a study of the entire legislative history of the Act, that where there is a service paid for by the supplier, and the service is actually rendered and the amount so paid is not in excess of the value of the service, it is necessary to determine: 1) whether the service would benefit only the supplier; 2) whether the service would benefit only the customer; or 3) whether the service would benefit both the supplier and his customer. If a service can be said to benefit only the supplier or if the service benefits only the customer, there is no difficulty, as in the one case the Act is violated while in the other it is not. However, where it is conceivable that a service might benefit both the supplier and the customer, then, and only then, it becomes necessary to determine whom the services were *primarily* designed to benefit. If the services were primarily designed to benefit the supplier, the Act has not been violated; if the services were primarily designed to benefit the customer, then the Act has been violated unless proportionally equal treatment has been given that customer's competitor. If it is made to appear that equal benefits accrued to both the supplier and his customer from the service, then also the Act has been violated; and in determining whether the customer receives equal benefit, it must be made to appear that the customer has been able to shift to his supplier "substantial portions of *his own advertising*

*costs.*'' It becomes necessary, therefore, to examine the nature and extent of the benefits flowing from the Defendant Suppliers' paid advertisements in *Woman's Day* magazine.

As has been indicated, the advertisements in *Woman's Day* of each of the Defendant Suppliers were the result of a careful evaluation of *Woman's Day* as an advertising medium, each Defendant Supplier, through its advertising department and advertising agency, employing the same criteria in choosing to advertise in *Woman's Day* that it considered in choosing to advertise in any medium. *Woman's Day* is a high quality magazine of national prominence and it is considered an excellent advertising medium as attested by the list of nationally prominent advertisers (both food suppliers and non-food suppliers) that place their advertisements regularly in *Woman's Day*. And it is manifest that the Defendant Suppliers receive full value for their payments for their advertisements in *Woman's Day*. These facts, when considered with the absence of any evidence tending to establish any purpose or intent on the part of the Defendant Suppliers, individually or collectively, to favor A&P (New Jersey) over the Defendant Suppliers' other customers, clearly establish that each of the Defendant Suppliers' advertisements in *Woman's Day* was a component part of each supplier's advertising program which was designed only to promote public acceptance of the product advertised and, as such, was designed primarily to benefit each of the Defendant Suppliers. Indeed, there is no evidence of any ulterior motive on the part of any Defendant Supplier in advertising in *Woman's Day*.

Plaintiffs seem to suggest that the advertisements of each of the Defendant Suppliers in *Woman's Day* were A&P advertisements. To answer this, it is necessary to distinguish between grocery store advertising and national

brand advertising of groceries. Grocery store advertising is designed and intended to bring people into a particular store and features the price of the product and the location of the store. National brand advertising, conversely, mentions no price and does not mention the name or location of any store or stores—it merely attempts to acquaint the reader with the desirability of trying a particular nationally known, brand name product.

In the instant case, the evidence reveals that the advertisements of each of the Defendant Suppliers were advertisements of the various products handled by each supplier; the advertisements failed to make any reference to the price of the particular product advertised, nor did they include any mention of the name or location of any store where these products might be purchased. Indeed, the copy of each of the Defendant Suppliers' advertisements in *Woman's Day* was identical with the copy run by each Defendant Supplier in other magazines and newspapers that were issued at or about the same time as was the particular issue of *Woman's Day*. Thus, the copy of each of the Defendant Suppliers' advertisements in *Woman's Day* was not in any way tailored to that magazine. The conclusion is inescapable that the advertisements of each of the Defendant Suppliers in *Woman's Day* were national brand advertisements of grocery products as distinguished from grocery store advertisements. This is but one of the facts which conclusively establish that the advertisements of each of the Defendant Suppliers were not A&P advertisements but were advertisements primarily designed to benefit each Defendant Supplier by promoting the sales of Defendant Suppliers' products to as many potential purchasers as possible, with the benefits accruing to A&P being only incidental.

That the advertisements of the Defendant Suppliers in *Woman's Day* were not A&P advertisements but national

brand name grocery product advertisements with the benefits accruing to A&P being incidental to the benefits accruing to the Defendant Suppliers, is also established by the evidence that conclusively shows that the Defendant Suppliers' product advertising in *Woman's Day* aids in the sale of the advertised products by all grocers who carry the product advertised. This finding is based on several facts, the most important of which is that purchasers of food products do substantial shopping in more than one store. Indeed, the plaintiffs themselves, in attempting to show competition between A&P stores and independent retailers, argue, in their briefs, that the A&P and the independent are competing for the trade of the same customer "who interchanges his patronage."

The document entitled *Bench Marks for the Next Five Years in Grocery Selling* (Morton's Ex. 11), which was an address given to the National-American Wholesale Grocers Association, on September 13, 1955 by Curtis C. Rogers, Executive Vice President of the Market Research Corporation of America, contains some rather illuminating statistics concerning store loyalty of shoppers. On page 5 of this document, Rogers states, with respect to Chart VI appearing on that page:

> "But families don't shop in just one grocery store. The average family shops in 3.7 stores per month. The families shopping in independent stores average 2.6 stores per month, while the exclusive chain store families shop in nearly 2 stores per month. But remember that ¾ of all of the families shop in both chains and independents, and this group are really shoppers—they average 4½ stores per month."

And on page 11 of Morton's Exhibit 11, Rogers states with respect to Chart XII appearing on that page:

> "We find that out of each 100 families who bought coffee in Store A, 44 made their next purchase of coffee

at some other store—on canned vegetables, 56 bought their second purchase at some other store—and on frozen vegetables, 52 bought next at a different store. The *housewife shops* where she can get the *brands* and the *products* that she wants at prices that represent the best value to her." (Emphasis, his)

The findings contained in Chart XII of Morton's Exhibit 11 were the result of a two-week shopping history of typical grocery items, while the findings reflected by Chart VI appear to be the result of a 15-year study of that particular topic. These findings are persuasive in corroborating what I believe to be facts that cannot be seriously disputed. Competition between grocery stores is very keen and in these days of the high cost of living, the housewife is well aware of the necessity of seeking out a bargain. As a result, the housewife shops "where she can get the *brands* and the *products* that she wants at prices that represent the best value to her." She becomes acquainted with the necessary facts concerning a bargain in a number of ways, one of which being the grocery store advertisements appearing in newspapers and in handbills distributed to the homes in the vicinity of a particular store. On the other hand, the national brand grocery product advertising by the Defendant Suppliers appearing in *Woman's Day* might acquaint the reader with the desirability of trying a particular brand name food or keep the name of that product before the public, much the same as it does when it appears in other magazines such as *Life*, *McCall's*, *Look*, etc., but that advertising is not a suggestion, much less a command, to purchase the article at A&P. The food shopper buys where she can purchase the brands and products at the least cost to her. If an advertisement in *Woman's Day* attracts her attention favorably, she will purchase that product at one of the stores which she patronizes, if the price is right. Thus, viewing the lack of store loyalty

among grocery store shoppers, and considering the fact that the grocery shopper interchanges her patronage and buys where she can get the quality product for the least money, and considering also the fact that the Defendant Suppliers' advertisements in *Woman's Day* are national brand name grocery product advertisements, which suggest neither the price nor place where the products might be purchased, I find that the advertisements by the Defendant Suppliers in *Woman's Day* magazine are designed to aid in the sale of the advertised products by all grocers who carry that product and not merely A&P. Accordingly, I find that, assuming that said advertisements in *Woman's Day* do the job that they were intended to do, the advertisements in *Woman's Day* have, in fact, aided in the sales of the advertised products in all grocery stores and not merely A&P stores.

Corroborative of this finding is a letter (A&P Ex. 61) received by Woman's Day, Inc. from Heublein & Bro., makers of A.1. Sauce. After informing *Woman's Day* that Heublein's experience was that *Woman's Day* produced an unusually high number of requests for an advertised A.1. Sauce booklet, the letter dated December 3, 1943, stated as follows:

> "Therefore, I am very happy to tell you of the swell job *Woman's Day* is doing for A.1. Sauce. Even more significant is the fact that we can definitely trace a substantial increase in the sales of A.1. Sauce since we started using *Woman's Day* several years ago; not only through the A&P Stores, where the magazine is distributed but also through the other stores located in the neighborhood of the A&P stores.
>
> "This indicates to us an increased sale through all outlets catering to and competing for the business in the shopping neighborhoods adjacent to an A&P Store where *Woman's Day* is distributed."

Plaintiffs seek to discredit the weight of this letter by arguing that *Woman's Day* apparently could find only one such document from thousands of documents that were available to it. Assuming that this is true, nevertheless no document was introduced which stated a position contrary to the contents of Heublein's letter. Furthermore, the Heublein letter merely corroborates the conclusion drawn from the other evidence adduced; that is, the nature of the particular type of advertising in *Woman's Day* and the lack of store loyalty among grocery shoppers conclusively show that the Defendant Suppliers' advertisements in *Woman's Day* aided in the sales of the products advertised not only in A&P stores but also in all grocery stores carrying that particular product.

Underlying the conclusion that advertisements in *Woman's Day* aid in the general sale of the particular product advertised, is the fact that *Woman's Day* is not an "in-store" promotional device. In other words, although the shopper purchases the magazine in an A&P store, she does not read the magazine in the store. Thus, the shopper picks up a copy of the magazine at the check-out counter of an A&P store and does not get an opportunity to read the magazine until she leaves the store. That being the case, she is not exposed to Defendant Suppliers' advertisements in *Woman's Day* until after she leaves the A&P store. Assuming that an advertisement in *Woman's Day* arouses her desire to purchase a particular product, the shopper is free to purchase that product in the next store she visits if the price is acceptable. And it should be observed that many copies of *Woman's Day* are passed along to other readers who perhaps do not shop at an A&P store. Clearly, therefore, *Woman's Day* is not an "in-store" promotional device and, as such, the advertisements therein may benefit all grocery stores and not merely A&P stores.

Concerning the issue whether A&P shifts substantial portions of its own advertising costs to the Defendant Suppliers, here again, plaintiffs' position is unsupported by the evidence. As has been indicated, the advertisements in issue were designed primarily to benefit each of the Defendant Suppliers for which each received full benefit for their payments. The benefit accruing to A&P from these advertisements was merely incidental to that accruing to each of the Defendant Suppliers. These advertisements were not A&P advertisements but national brand grocery product advertisements. The evidence reveals that A&P spends millions of dollars in advertising each year. It is also interesting to note that the various A&P manufacturing subsidiaries, which compete with the Defendant Suppliers, advertise their products in *Woman's Day* for which full payment to Woman's Day, Inc. is made. Plaintiffs attempt to belittle these facts by arguing that A&P derives cost-free advertising from the promotion and sale of *Woman's Day*. Underlying this contention, however, is plaintiffs' argument that the Defendant Suppliers make *Woman's Day* possible by their payments for advertisements therein; but this contention, as has been indicated hereinbefore in this memorandum, is totally without merit. Nor is it true that A&P receives cost-free advertising from *Woman's Day* because the record shows that A&P has paid for certain of *Woman's Day* advertisements on radio, television and in the newspapers, and the record also reflects that the costs of distribution of the magazine from the warehouse to the store are assumed by A&P, not to mention the fact that certain A&P employees devote an appreciable amount of time in the promotion, distribution and sale of *Woman's Day*. It is quite apparent, therefore, from the evidence adduced that A&P does not shift substantial portions of its own advertising costs to the Defendant Suppliers.

For the reasons stated, I hold that the advertisements of each of the Defendant Suppliers in *Woman's Day* magazine were not A&P advertisements but advertisements primarily designed to benefit each of the Defendant Suppliers who received full value therefrom with the benefits accruing to A&P being incidental to those accruing to each of the Defendant Suppliers. I also hold that the evidence fails to reveal that A&P has shifted to the Defendant Suppliers substantial portions of A&P's own advertising costs. Accordingly, I hold that the plaintiffs have failed to prove that the Defendant Suppliers have violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act.

There are, however, other reasons which compel such a finding. The evidence reveals that the Defendant Suppliers advertised in other store distributed magazines, such as *Family Circle, Better Living, Everywoman's* and *American Family. Better Living* was sold by seven of the plaintiffs until it suspended publication in May 1956. At present, none of the plaintiffs offers for sale a store magazine as apparently no such magazine is available for their distribution. However, I think a reasonable inference could be drawn from the evidence adduced that the Defendant Suppliers would advertise in a magazine distributed by any of the plaintiffs if it met the fixed standards that must be satisfied before each of the Defendant Suppliers decided to advertise in any magazine. The question arises, therefore, whether the Act is violated if the one purchaser is unable to furnish the service which that purchaser's competitor furnishes and for which the common supplier makes payment. Stated in another way, assuming *arguendo* that the payments by the Defendant Suppliers in this case for advertisements in *Woman's Day* violated Section 2(d) of the Act, how could the Defendant Suppliers have nullified that violation by making proportionally equal payments to the plaintiffs, if the plaintiffs could not furnish

the service for which payment would be made? Congressman Utterbach answers this dilemma by stating:

> "But it is further claimed that the provisions of the bill with regard to advertising allowances work a hardship on the small manufacturer, in that they require such allowances to be granted to all competing customers on proportionally equal terms. But proportional to what? Proportional naturally to those customers' purchases and to their *ability and equipment to render or furnish the service or facilities to be paid for*". (Emphasis added) 80 Cong. Rec. 9146.

In the instant case, the plaintiffs do not publish or sell a store distributed magazine and, thus, they are unable and unequipped to render or furnish the services for which payment would be made and for which the Defendant Suppliers in this case pay *Woman's Day*. Being so unable to furnish these services, plaintiffs have no standing to complain about the Defendant Suppliers' advertising in *Woman's Day* even if it were assumed that these payments violated the Act. This seems manifestly clear from the overall intent of the Act and particularly from the quoted excerpt from Congressman Utterbach's speech. Plaintiffs' suggestion that this difficulty could be cured if A&P made *Woman's Day* available for sale in all grocery stores, including plaintiffs', is untenable for the simple reason that the Act imposes no such duty on one customer of the common supplier to furnish for his competitor services which the competitor is unable to render and for which the common supplier would make payment to him.

Plaintiffs fail to cite any authority which militates against the conclusions reached in this memorandum. The cases they cite, unlike the case at bar, involved services which were inherently discriminat[illegible] in that they could in no way benefit any customer ot[illegible]han the customer to whom the service was given. Thus, in each case the serv-

ice involved was primarily designed to benefit the one customer and not the supplier, or at least the benefits were equal between the two.

In *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, Corn Products spent $750,000 in advertising Curtiss candy bars as being "rich in dextrose." Corn Products had sold dextrose to Curtiss which processed the dextrose into candy bars which Curtiss then sold to the consuming public. The Supreme Court held that Corn Products' failure to make those advertising services available to its customers on proportionately equal terms violated Section 2(e) of the Act. In that case it is quite clear that Corn Products was primarily advertising Curtiss candy bars and that it was assuming advertising costs which properly should have been borne by Curtiss. The results of these advertisements could have in no way benefited any of Curtiss' competitors and thus it could not have been said that the results thereof benefited Corn Products primarily and Curtiss only incidentally.

In *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, C. A. 8 Cir., Elizabeth Arden paid one customer for the entire salary of a store clerk who was provided by that customer to demonstrate Elizabeth Arden products. However, Elizabeth Arden paid another customer, who was a competitor of its first customer, only one-half of the salary of the demonstrator provided by it. The Court of Appeals for the Eighth Circuit held that this unequal treatment to competing customers of Elizabeth Arden bore no reasonable basis and was therefore discriminatory and violative of the Act. Thus, it is again manifest that the demonstrator's service could in no way benefit any competitor of the favored customer. The demonstrator's service was designed primarily to benefit the one customer with Elizabeth Arden assuming costs for services which ordinarily

should be assumed by the customer who resells the product to the consumer.

And so it is with the services involved in the Federal Trade Commission cases cited by the plaintiffs. Each case involved services which were inherently discriminatory and which were primarily designed to benefit only the customer. No useful purpose would be gained by going into a more detailed discussion of those cases; suffice it to say that they are readily distinguishable on their facts from the instant case.

## TYPICAL ADVERTISEMENT OF A GENERAL FOODS PRODUCT IN *WOMAN'S DAY* AND SCHEDULE OF OTHER PUBLICATIONS IN WHICH IT APPEARED

The advertisement appearing on the opposite page appeared in the January, February and March, 1954 issues of *Woman's Day* and is typical of the advertisements of General Foods products that appeared at various times in *Woman's Day*. The identical advertisement appeared in other publications in the issues listed below (see General Foods Ex. 24).

| Name of Publication | Issues |
|---|---|
| Better Homes & Gardens | October, 1953; January, February, March, 1954 |
| Capper's Farmer | October, November, 1953; January, February, 1954 |
| Country Gentleman | October, November, 1953; January, February, 1954 |
| Family Circle | October, November, 1953; January, February, March, 1954 |
| Farm Journal | October, November, 1953; January, February, 1954 |
| Good Housekeeping | October, November, December, 1953; February, 1954 |
| Ladies' Home Journal | October, November, December, 1953 |
| Life | October, October, November, November, November, 1953; January, January, 1954 |
| Look | October, October, November, 1953 |
| Progressive Farmer | October, November, 1953; January, February, 1954 |
| Saturday Evening Post | October, October, November, 1953 |
| Sunset | October, November, 1953; January, February, 1954 |

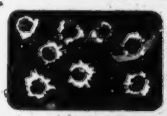
# AMAZING COFFEE DISCOVERY!

**Not a powder! Not a grind! But millions of tiny "FLAVOR BUDS" of real coffee...ready to burst instantly into that famous Maxwell House flavor!**

**Utterly unlike old-style "instants"... just as quick but tastes so different!** In the famous Maxwell House kitchens, this superb, roaster-fresh coffee is actually brewed for you. At the exact moment of fresh-brewed perfection, the water is removed—leaving the millions of miracle "Flavor Buds"!

**100% pure coffee!** You just add hot water—and the "Flavor Buds" flood your cup with coffee as rich and delicious as the best you've ever brewed! *Saves money, too!* The large economy size saves up to 75¢, compared to three pounds of ground coffee!

**See how the Flavor Buds "come to life" in your cup!**



Magnified view of miracle "Flavor Buds" as the instant hot water is added. See how "Buds" release famous Maxwell House flavor! This is coffee—as perfect as any you've ever tasted!

**The only instant coffee with that GOOD-TO-THE-LAST-DROP flavor!**

Look for the jar with the silver cap top!

MARCH, 1954

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## TYPICAL ADVERTISEMENT OF A HUNT FOODS PRODUCT IN *WOMAN'S DAY* AND SCHEDULE OF OTHER MAGAZINES IN WHICH IT APPEARED.

The advertisement appearing on the opposite page appeared in the April, 1955 issue of *Woman's Day* and is typical of the advertisements of Hunt Foods products that appeared at various times in *Woman's Day*. The identical advertisement appeared in other publications in the issues listed below (see Hunt Ex. 12).

| Name of Publication | Issues |
|---|---|
| McCall's | September, 1955 |
| Ebony | June, 1955; January, 1956 |
| Redbook | April, 1955 |
| Good Housekeeping | September, December, 1955 |
| Better Living | August, 1955 |
| Family Circle | April, 1955; January, 1956 |
| Life | January 17, 1955 |
| Everywoman's | April, 1955 |
| The American Weekly | May 1, August 28, 1955 |
| New York Herald Tribune | April 3, July 3, October 23, 1955 |
| New York News | November 21, 1954; April 17, July 10, 1955; January 29, 1956 |
| New York Times | February 13, July 17, September 18, 1955; January 15, 1956 |
| New York Mirror | December 12, 1954; May 8, August 7, November 11, 1955 |
| New Orleans Times Picayune | December 19, 1954; June 19, 1955 |
| Newark News | March 27, June 19, October 9, 1955 |
| Baltimore Sun | May 15, August 21, 1955 |
| Washington Star | April 24, August 14, 1955 |
| Indianapolis Star ) Columbus Dispatch) Cincinnati Inquirer) | April 24, 1955 |
| Seattle Times | April 17, August 14, November 9, 1955 |
| St. Louis Globe Democrat | May 29, August 14, 1955 |
| Minneapolis Tribune) Milwaukee Journal ) | May 15, 1955 |
| Des Moines Register) | October 24, 1954; August 14, 1955 |
| St. Louis Post Dispatch | January 30, June 5, October 2, 1955 |
| Boston Globe | March 13, June 5, September 18, 1955 |
| Buffalo Courier Express) Syracuse Post Standard ) | April 17, 1955 |
| Detroit News | February 27, May 22, August 28, 1955 |
| Chicago Tribune | August 14, 1955 |

Quick Stunts with Hunt's Tomato Sauce

# 10-Minute Pizza . . .

*Delicious for Dinner...a Perfect Evening Snack*

We've never seen it fail—

When you serve your friends these delicious little Hunt Pizzas, everybody raves about them—especially the men. And the women all want the recipe.

You'll find Hunt's Tomato Sauce exactly right for this quick and easy treat. It's all tomato—rich in flavor, seasoned and spiced deliciously.

And you'll see what a handy "flavor headstarter" Hunt's Tomato Sauce is to have in the pantry—for your stews, casseroles, meat loaf—dozens of your recipes.

Choose the Hunt red-label when you buy tomato sauce. Then, enjoy these little Hunt Pizzas with your family and friends.

Split four English muffins in half and toast in broiler. On each toasted half, make layers of the following:

A slice of cheese (Mozzarella is the real "pizza cheese" but you may use brick, Swiss or any good "melting" cheese)
One tbsp. Hunt's Tomato Sauce
One tbsp. salad oil
Salt and pepper (garlic salt optional)
A sprinkle of oregano (optional)
Sprinkle with grated cheese (Parmesan preferred)

Place on a cookie sheet in 450° oven for 5-10 minutes—till ingredients are hot and cheese melted. Makes 8 little Pizzas.

For variety, top with bits of Italian sausage, anchovies or sliced stuffed olives.

Hunt-
for the best

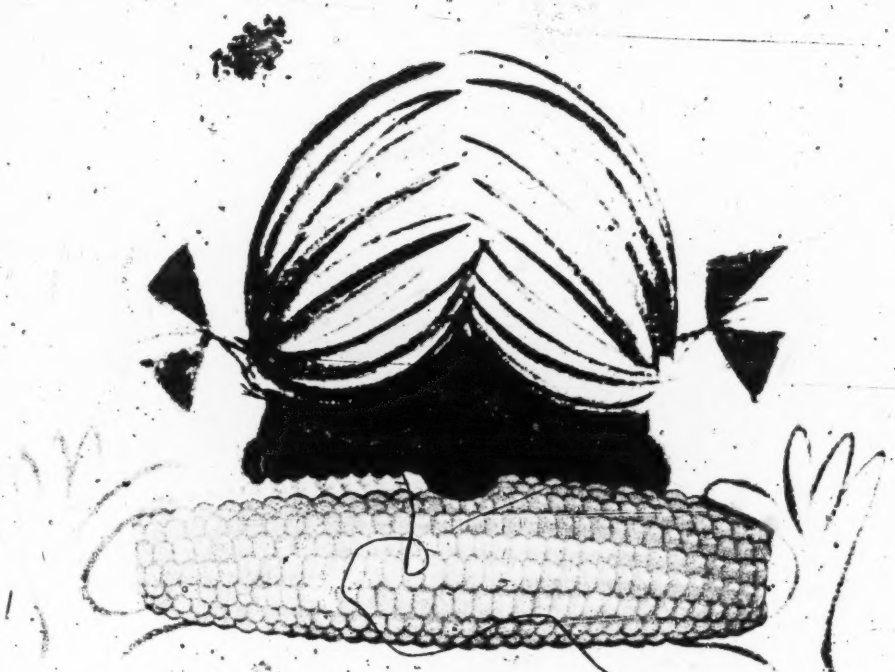
*Headquarters! One on the back of every can of Hunt's Tomato Sauce—at your grocer's.*
*Hunt Foods, Inc.*
*Fullerton, California*

## TYPICAL ADVERTISEMENT OF A MORTON SALT PRODUCT IN *WOMAN'S DAY* AND SCHEDULE OF OTHER PUBLICATIONS IN WHICH IT APPEARED.

---

The advertisement appearing on the opposite page appeared in the July, 1956 issue of *Woman's Day* and is typical of the advertisements of Morton Salt products that appeared at various times in *Woman's Day*. The identical advertisement appeared in other magazines in the issues listed below (see Morton Exhibit 2).

| Name of Publication | Issue |
|---|---|
| Woman's Day | July, 1956 |
| Western Family | July, 1956 |
| Household | July, 1956 |
| Good Housekeeping | July, 1956 |
| Life | July 23, 1956 |
| Farm Journal and Country Gentleman | August, 1956 |
| Everywoman's | August, 1956 |
| Better Homes and Gardens | August, 1956 |
| Ladies Home Journal | August, 1956 |
| Family Circle | September, 1956 |
| True Story | September, 1956 |
| Sunset | September, 1956 |



*m-m-m-m-m-m-m*

*another good reason for*

*When it rains it pours*

**P.S. Two new ways to salt corn, or anything else!**

*Morton Moisturets, 1¼ inches high, packed six to the tray.*

*Morton Sakura, 3¼ inches in size, sold in cartons of three.*

FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

## No. 569

**GENERAL FOODS CORPORATION, HUNT FOODS, INC. and MORTON SALT COMPANY,**

*Petitioners,*

vs.

**STATE WHOLESALE GROCERS, et al.**

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.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CHICAGO LAW PRINTING CORPORATION 189 W. MADISON CHICAGO-FRANKLIN 2-6521

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Respondents (hereinafter sometimes referred to as "Plaintiffs") respectfully submit the following in opposition to the Defendant Suppliers' Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 25, 1958 as amended on September 17, 1958.

## QUESTIONS PRESENTED.

Questions 1 and 4 as stated by Petitioners are not issues before this Court. The issue of burden of proof alleged in question 1 is non-existent, the Court of Appeals having found, and the Stipulations and evidence support the finding, that all the necessary elements of a violation of Section 2(d) were proved. Further, the only burden of proof imposed upon the defendants by the Court of Appeals was that of proving availability of proportional equal payments to any plaintiff. Even, therefore, if the issue of burden of proof were not moot, the question should properly read:

> 1. "Is the proportional availability of payments an affirmative defense under Section 2(d) of the Robinson-Patman Act as to which the burden of proof rests upon the defendant or is proof of the absence thereof a part of the plaintiffs' *prima facie* case?"

Question 4 inquiring as to whether in order to be a customer of a supplier "competing in the distribution of such products" under §2(d), a retailer must handle the specific product of the supplier at the time of promotion thereof by the supplier, is similarly moot inasmuch as the Record establishes that each plaintiff retailer met this required specificity.

Question 2 is but a partial statement of the "service or facility" issue under §2(d), omitting essential facts proved herein as found by the Court of Appeals. We submit that, pursuant to that Court's finding, the proper statement thereof is:

> 2. "Is a supplier's payment for a leading national magazine published by a wholly owned subsidiary of a customer and sold only in that favored customer's retail stores, payment for a service or facility within the meaning of §2(d) where the food products advertised therein are exclusively products sold in that

customer's stores and where the magazine was created for and serves as a promotional device of that customer, is an effective means of cost free advertising of that customer's stores in general in all types of internal and external media, creates good will enabling those stores to attract new customers and keep old ones, and exists solely for competitive benefit to that customer's retail stores?"

Question 3 relating to who is a "customer" under §2(d) similarly omits essential, proved facts and findings and should read:

3. "Is a retailer a 'customer' of a supplier within the meaning of §2(d) if the retailer purchases a supplier's products from a jobber or wholesaler, but where a direct relationship exists between the supplier and that retailer, such as direct visitation of the retailer by the supplier, direct solicitation and writing up of orders then given to the wholesaler by the supplier and the furnishing by the supplier directly to the retailer of diverse personnel and materials to aid in selling the supplier's products?"

## STATEMENT OF THE CASE.

Respondents respectfully submit that certain essential facts were omitted from Petitioners' statement of the case. These are as follows:

The annual costs of producing the magazine, *Woman's Day,* is approximately 9 million dollars per year. Of that total cost approximately 7 million dollars annually is paid to Woman's Day, Inc., a wholly owned subsidiary of A & P, by the Defendant suppliers and other suppliers of products sold by the said A & P. The annual payments of the food suppliers to Woman's Day, Inc. represent for the years pertinent hereto approximately 8% to 10% of the net profits of A & P (before taxes) in all of its operations. This added revenue to A & P was thereby available

(after reduced by taxes) to A & P for competitive purposes. The magazine, *Woman's Day,* sells approximately 42 million copies per year in the stores of A & P only. At all times it contained on its cover the legend "The A & P Magazine" and was without exception expressly held out and advertised to the public as the A & P magazine, available only at A & P stores. It was created by A & P as a promotional device for A & P to create customer good will and to increase or maintain store traffic. It promoted A & P and A & P stores without cost to A & P in all types of internal and external media, including other magazines, newspapers, radio and television. All of the food products advertised therein were exclusively products sold in A & P stores. *Woman's Day* is an effective media for the advertising of A & P stores in general, it creates good will among the customers of A & P and it attracts new customers for A & P and keeps their old ones. It exists exclusively for the competitive benefit of A & P's retail stores. All of the foregoing is without cost to A & P and in fact the magazine, *Woman's Day,* produced a profit to A & P and is a source of revenue to A & P. *Woman's Day* is the only national magazine published by a wholly owned subsidiary of, and distributed exclusively though the retail stores of, a single retail food organization.

The Defendant suppliers used *Woman's Day* for the purpose of increasing the sales of the products of the Defendant suppliers to A & P customers in A & P stores.

## ANSWER TO PETITIONERS' REASONS FOR GRANTING THE WRIT.

### I.

### THE RULE OF LAW LAID DOWN BY THE COURT BELOW REGARDING THE PROCEDURAL ISSUE OF BURDEN OF PROOF WAS DICTUM AND NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OR OF THE FEDERAL TRADE COMMISSION.

Contrary to Petitioners contention drawn from the removal from context of isolated portions of the Court's Opinion, the 7th Circuit Court of Appeals did not excuse Plaintiffs from establishing a *prima facie* case, did not shift that burden of proof to the Defendants and did not upset the procedural law applicable to every Section 2(d) and 2(e) Robinson-Patman Act case. Consideration of the entire Opinion makes inescapable the conclusion that only after the Plaintiffs have established a *prima facie* case by proving that each was a customer of the Defendant suppliers competing with A & P and that each did not receive payments proportionally equal to the suppliers' payments to A & P, does the burden fall upon the Defendants to show that such payments were nevertheless made proportionally available to Plaintiffs, the only statutory justification for non-payment under §2(d). This Petitioners themselves acknowledge. (Pet. 17). The imposition upon Defendants of this limited burden of proving proportional availability is consistent with all the decisions. Actually the entire reference to burden of proof in the instant case was but dictum; the Court, as will be specifically shown, having found that each Plaintiff was a customer of each Defendant supplier and it having been stipulated not only that each Plaintiff retailer was a competitor of A & P but

neither received nor had had made available to him payments proportional to the suppliers' payments to A & P. Petitioners in their Petition for Rehearing acknowledged that the burden of proof issue had actually been stipulated out of this case. (Pet. for Reh. of Def. Suppliers, p. 12).

The imposition of the burden of proof upon a supplier to prove proportional availability after a competing customer has established a *prima facie* case of non-payment is completely consistent with the decisions referred to by Plaintiffs. In *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958) (2d Cir.), 1958 C.C.H. Trade Cases, Par. 69,099, the Court's objection to the Commission's finding that a *prima facie* case had been established was that Plaintiff had not proved that the non-favored customer was a competing customer. By clear implication, had such showing been made as was done in the instant case, the liability of the supplier would have been established unless the supplier was able to prove proportional availability notwithstanding its failure to actually make proportional payments. The Court in *Simplicity Pattern Co., Inc.* v. *Federal Trade Commission*, 258 F. 2d 673 (Adv. Sheet No. 3, Oct. 27, 1958) (D.C. Cir.), 1958 C.C.H. Trade Cases, Par. 69,047, clearly acknowledged defendant's burden of proving statutory justification for the absence of proportionally equal treatment.

The correctness of imposing upon a Defendant the burden of proving proportional availability is clear. The violation here involved is one of Section 2(d) of the Robinson-Patman Act. A 2(d) violation is a *per se* violation where failure to make proportionally equal payments to competing customers can be justified only by proof that such payments were nevertheless made available to competing customers. If this were not the burden of the Defendant, the Plaintiff in a Section 2(d) case would have the entire bur-

den of proof thereunder, including negating the only affirmative defense available to a Defendant under that Section, namely, proportional availability.

It is apparent, therefore, that Petitioners in order to rationalize a basis for urging a writ of certiorari upon which basis they could and did place their primary reliance, unwarrantedly concluded that the Court of Appeals imposed a broad, extensive burden of proof upon Defendants affecting all 2(d) and 2(e) Robinson-Patman Act cases. They but created a strawman to destroy. The fact is that not only did the Court of Appeals impose upon Defendants only the burden of proving the affirmative defense of proportional availability but, in fact, the entire issue of burden of proof had been stipulated out of the instant case. The decision of the Court of Appeals was correct and consistent —rather than in conflict—with the prevailing opinions of other circuit courts.

## II.

## THE "SERVICE OR FACILITY" ISSUE.

Contrary to Petitioners contention, the Court of Appeals made no generalizations with reference to the "service or facility" issue applicable to and affecting all 2 (d) and 2(e) Robinson-Patman Act cases. Rather, the findings of that Court were based upon the specific evidence introduced in this case and applicable only thereto. Further, the Opinion of the Court was neither inconsistent nor self-contradictory. The inconsistency of which Petitioners complain resulted solely from their attempt to inject into the Opinion the same artificial analysis of fact and law twice urged by them before the Court of Appeals and twice repudiated.

Petitioners argue that the Court having found that Supplier payments to *Woman's Day, Inc.* for advertising space therein did not constitute a *furnishing* of the maga-

zine, *Woman's Day*, within the meaning of Section 2(e) and inasmuch as *Woman's Day* was found to be the service or facility furnished by or through A & P, it must follow that such payments cannot constitute violations of 2(d). The Court of Appeals on the other hand concluded that although such payments by suppliers, making up 7 million dollars of *Woman's Day's* 9 million dollar annual cost, did not constitute a physical *furnishing* of *Woman's Day* under Section 2(e), such payments did constitute *payments* for *Woman's Day* under Section 2(d) inasmuch as it is "the *fact* of paying or contracting for the services or facilities referred to (which) is proscribed by that section . . ." (Emphasis the Court's). (App. 31)* This conclusion is consistent with both the facts and the law.

The Court of Appeals construed Section 2(e) as requiring a physical furnishing of a service or facility, concluding that the payments for *Woman's Day* did not constitute such a furnishing because the suppliers:

> "In no way dictated the editorial or other policies of *Woman's Day*. They did not manage or control the operation thereof. They did not have anything to do with the printing of the magazine or the furnishing of any paper or materials used in the magazine's publication . . . They were not furnishing . . . any part of the production of the magazine. That production was exclusively a function of Woman's Day, Inc."

However, that Court did find that the payments to the magazine for advertising space therein constituted payments for that service or facility, *Woman's Day*, under § 2(d), a fact well supported by the evidence.

Petitioners, as they did unsuccessfully before the Court of Appeals, seek to isolate the payment for advertising space in *Woman's Day* from *Woman's Day* itself. The

* The Appendix made a part of the Petition for Rehearing will be referred to herein as "App. ....." The Appendix filed in the Court of Appeals and entitled "Appendix to Appellants' Brief" will be referred to herein as "App. to Appellants' Brief —".

Court, however, found as a matter of fact that such payments constituted payments for the magazine. If each supplier had made payments to *Woman's Day, Inc.* without receiving advertising space therein it would be undenied that they would be paying for *Woman's Day* in clear violation of Section 2(d). Petitioners do not deny the correctness of the Court of Appeals conclusion that neither motive, intent nor the receipt of value by a supplier for a discriminatory payment affects the violative nature of that payment under Section 2(d). The advertising space in *Woman's Day* received by suppliers is nothing but value received for such payment; the effect of the payment is the same. Yet the Defendant suppliers continue to urge the *non-sequitur* that their payments to *Woman's Day* were not payments for *Woman's Day.*

The distinction between Sections 2(d) and 2(e) found by the Court of Appeals is as simple as this: § 2(e) restricts the physical *furnishing* of a service or facility by a supplier to a favored customer whereas § 2(d) restricts the *payment* therefor by the supplier. Although these two sections in some respects have been similarly construed, at no time have the Courts found them to be synonymous. Had Congress intended that result there would have been but one section. That payment to *Woman's Day* for advertising space therein may not constitute a *furnishing* of a facility under Section 2(e), therefore, does not preclude such payments from constituting *payments* for that facility under Section 2(d), the natural result thereof as found by the Court of Appeals.

The factual conclusion of the Court of Appeals that the payments of the Defendant suppliers were in fact payments for the magazine *Woman's Day* is not made inconsistent by Petitioners strained and artificial construction of the facts. *Woman's Day*, the facility found to be paid for by the suppliers was of immeasurable cost free benefit to A & P. The stipulations and the evidence established

that it is the *only* magazine published by and distributed exclusively through the retail stores of a single chain organization, being always identified on the cover and to the public as the magazine of that single chain, containing advertisements only of the food products sold in that chain's stores, used as a means of specifically advertising that single chain without cost to it in all types of internal and external media and being otherwise of immeasurable cost free benefit to A & P. The Court of Appeals found, and the evidence adequately supports such finding, that:

> "*Woman's Day* is an effective medium for the advertisement of the A & P stores in general. It creates good will among the customers of A & P. It attracts new customers for A & P and keeps its old ones. It sells approximately 42 million copies a year (In A & P stores only). It is a promotional operation of A & P. It exists solely for competitive benefit to A & P's retail stores". (Parenthetical expression ours); (App. 25)

It is apparent that the Court of Appeals was not inconsistent and made no sweeping findings with reference to the nature of a service or facility applicable to all Robinson-Patman Act cases, as petitioners allege to justify their request for certiorari. Rather, the Court made specific findings from the specific evidence herein introduced, applicable only to what it found from such evidence to be the service or facility here involved. The facts of this case with reference to the service or facility, *Woman's Day*, and the payment therefor have meaning only in the factual setting found by the Court and no effort by petitioners can give to these specific facts a general application. This is of even greater significance inasmuch as A & P, subsequent to the decision, sold its entire interest in *Woman's Day* (A. & P. Motion Amicus Curiae, p. 3) and therefore, that which was found to be the service or facility in this case cannot be the source of subsequent violations of §2(d).

## III.

## THE "CUSTOMER" ISSUE.

Petitioners then contend that if the Court of Appeals concluded that each Plaintiff was a *customer* of each supplier within the meaning of Section 2(d), then such conclusion is in conflict with the decision of the Third Circuit Court of Appeals in *Klein* v. *Lionel Corp.*, 237 F. 2d 13 (1956) because plaintiffs purchased defendants' products from wholesalers and not directly from the defendant suppliers.* The Court of Appeals in the instant case did find each Plaintiff to be a customer of each Defendant supplier within the meaning of Section 2(d), inasmuch as it found that that section required proportionally equal payments to be made to all competing customers of the suppliers and further found that the Defendant suppliers had violated that section by neither giving nor making available to the Plaintiffs such proportional payments. That conclusion is consistent with all of the decided cases including the *Klein* case.

The Trial Court in the instant case specifically found that "each of the defendant suppliers maintained a direct relationship with each of the Plaintiff retailers and other retailers similarly situated". (App. to Appellant's Br. 223) This finding sustained by the Court of Appeals was overwhelmingly supported by the evidence. It was stipulated as follows: 44 promotional men of General Foods each made 8 or 10 calls daily upon all Chicago retailers, directly soliciting sales and writing out orders, which were delivered either by that representative or by the retailer to the wholesaler or cooperative. In addition the company furnished to such retailers display and merchandising assistance and personnel such as demonstrators, sign painters, window trimmers, artists, food display and layout

* It was, however, stipulated that all but 8 plaintiffs bought Maxwell House Coffee directly from the defendant, General Foods Corporation (App. to Appellants' Br. 144).

personnel and the like. Representatives of Morton Salt promoted sales by directly soliciting orders from all Chicago retailers which they wrote out for the retailer, in addition to furnishing personnel to prepare food counters and window and shelf displays and gave other direct assistance and material. The Defendant Hunts similarly made directly available to all purchasers of the company's products, sales and promotional materials. (App. to Appellants' Br. 96, 100, 117, 141, 144-5)

Where such direct relationship between supplier and retailer exists short of actual sale, the Courts and Commission have consistently held the retailer to be a customer of the supplier. *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132 (2d Cir., 1946), Cert. den. 331 U.S. 806 (1946); *Kraft-Phenix Corp.*, 25 F.T.C., 537 (1937); *In re Luxor*, 31 F.T.C. 658 (1940). See also *F.T.C.* v. *Morton Salt*, 334 U.S. 37 (1948). The Trial Court in *Klein* v. *Lionel*, 138 F. Supp. 560 (D.C. Del., 1956) expressly recognized these prior decisions, acknowledged their validity and distinguished them from the *Klein* case on the facts because in the *Klein* case no relationship whatsoever between supplier and retailer was alleged, the Court saying (p. 564):

> "In the cited cases where the manufacturer dealt with a jobber, and a retailer from such jobber was held to have had some relationship to the manufacturer, it appeared that the manufacturer had either a direct relationship with the retailer *or* that it exercised a control over the relationship between the jobber and retailer. No such relationship exists here. No direct dealings have been alleged or shown between Lionel and the Plaintiff *nor* any measure of control by Lionel over the dealings of any jobber." (Emphasis ours).

The Court of Appeals for the Third Circuit in affirming the decision of the lower Court in the *Klein* case, 237 F. 2d 13 (3rd Cir., 1956) specifically noted the absence of any direct relationship between retailer and supplier, except for an alleged fair trade contract not with the Plaintiff specifically but covering that level of distribution. The

Court said (p. 16) "we, therefore, hold that a retailer who buys from a jobber does not become a purchaser under Section 2(a) of the Clayton Act *merely because* the products he deals in are fair traded" (Emphasis ours). Neither the Trial Court nor the Court of Appeals in the *Klein* case precluded the indirect purchaser from being a customer of the supplier where a direct relationship between the two, short of actual sale, existed. Rather, application of the rule there stated was limited to a fact situation where no direct relationship was alleged as between the supplier and customer.

That the rule of the *Klein* case is so limited is clear from *Skinner* v. *U. S. Steel Corp.*, 233 F. 2d 762 (5th Cir. 1956). That Court not only re-affirmed the decisions holding an indirect purchaser to be a customer within the meaning of that section but more significantly found such decisions to be completely consistent and compatible with the lower court *Klein* case. The express reason given by the Court for finding such compatibility was that the prior cases involved a direct relationship between supplier and indirect purchaser which was completely absent from the *Klein* case. The direct relationship between the Plaintiffs and the Defendant suppliers in the instant case as heretofore set out is substantially more than found in *Elizabeth Arden, Inc.* v. *F.T.C.*, 156 F. 2d 132 (2nd Cir. 1946), Cert. den. 331 U.S. 806 (1946) whose conclusion that the indirect purchaser was a "customer" was specifically reaffirmed in the *Skinner* case and held to be compatible with the *Klein* case. See also Kelley, *N. Y. State Bar Ass'n Symposium Anti-Trust Laws* (C.C.H., 1948) 114, 130; Keeton, Dean Texas Law School, 1950 *Institute on Anti-Trust Laws* (Southwestern Legal Foundation, 1950) 117, 130. Assuming arguendo the validity of the *Klein* case when applied to its limited facts, it is not inconsistent with the instant case.

There is further distinction between the facts of the *Klein* case and the instant case. The *Klein* case involved an alleged violation of Section 2(a) whereas the instant case involves a violation of Section 2(d). The latter section and section 2(e) were enacted to preclude suppliers, particularly in the food industry, from discriminating in favor of the chain store—the direct buyer—as opposed to the independent retailer—the indirect buyer—in a manner not encompassed by Section 2(a). Excluding the indirect buyer from the protection of Section 2(d) is to sanction the very discriminatory practice that section was enacted to preclude.

Petitioners' suggestion that the conclusion of the 7th Circuit Court of Appeals is contrary to certain Congressional citations included by petitioners (Pet. 16-17) is completely without merit. These citations do not answer but merely state the basic question: Who is a "Customer" under the Act? The conclusion of the Court of Appeals that the plaintiffs are "customers" of each defendant supplier within the meaning of § 2(d) is correct and consistent with the decisions.

## IV.

## THE "COMPETING IN THE DISTRIBUTION OF SUCH PRODUCTS" ISSUE.

Petitioners contend that the Trial Court improperly concluded that the Plaintiff retailers were customers of the Defendant suppliers in competition with A & P even though each Plaintiff retailer did not handle the specific products of the supplier at the time of their advertisement, which Petitioners erroneously assume to be the facts in the instant case. They contend further that this conclusion of the Court of Appeals is contrary to the ruling in *Atalanta Trading Corp.* v. *F.T.C.*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958), 1958 C.C.H. Trade Cases, 69,099 (2d Cir.). Petitioners create this issue of specificity in the in-

stant case when it does not actually exist and petitioner, Morton Salt, has in substance so acknowledged. (Pet. for Reh. p. 15). Petitioners contend that it was stipulated that Plaintiff stores are in competition with an A & P store only in the sense that both stores are seeking to gain the trade of at least one customer. By ignoring the balance of the stipulation (App. to Appellants' Br. 58) they create the ficticious issue of specificity by concluding that there was, therefore, no evidence from which the Court of Appeals could conclude that each Plaintiff retailer carried the products of the Defendant suppliers at the time of the advertisement thereof and that the conclusion of the Court that each Plaintiff retailer was "competing in the distribution of such products" was in error. The fact is that the above stipulation executed by each supplier further expressly provided: "such fact is sufficient to establish that each retail plaintiff is a competitive seller of A & P store solely for purposes of Sections 2(d) and (e) of the Robinson-Patman Act". This portion of the stipulation petitioners do not quote. Each Defendant supplier by executing and adopting this stipulation stipulated that each retailer was as to each Defendant supplier and its products, a competitor of A & P within the provisions of Section 2(d). The only language of Section 2(d) defining competition is found in the words "competing in the distribution of such products or commodities".

If, therefore, as petitioners contend, a customer must handle the specific products of the specific supplier to be a customer "competing in the distribution of such products or commodities" within the meaning of Section 2(d), then each defendant supplier stipulated, and the Court so found, that each plaintiff retailer meets that requirement. The defendants cannot stipulate that as to each of them plaintiffs are competitors of A & P within the meaning of Section 2(d) and then, as an afterthought, subsequently contend that plaintiffs, having failed to introduce specific

proof in connection therewith in reliance upon the stipulation, have failed to prove that they are competitors under Section 2(d) within Petitioners' construction thereof.

Further, it was also stipulated (App. to Appellants' Br. 54), and the Court of Appeals specifically found (App. 23) that each plaintiff retailer at all times pertinent hereto sold one or more of the products of each of the defendant suppliers. A similar stipulation was entered into with reference to the plaintiff wholesalers (App. to Appellants' Br. 54), concerning which the Defendant, General Foods Corporation, originally stated that, "while the particular products are not identified, it is fairly inferable from the evidence that A & P purchased the same products from General Foods". (General Foods Trial Br. 55) Why was this similar conclusion not equally inferable from the very same stipulation with reference to the retailers, particularly since it was further stipulated as to the retailers that they were competitors of A & P for all purposes under Section 2(d). The only difference, between the wholesalers and retailers in the agreed facts is that the former acquired their products directly from the suppliers and the latter from wholesalers. What petitioners are really arguing, therefore, is not that these specific products were not being handled by the Plaintiff retailers, the stipulations establishing the contrary, but rather that they were not bought directly from them. It having been established that the indirect purchaser argument has no applicability in this case, this contention of these petitioners must necessarily fall. Therefore, even if petitioners are correct in contending that each Plaintiff retailer must handle the specific products at the specific time in order to qualify as a customer under Sec. 2(d), each plaintiff retailer so qualifies. The requirement of *Atalanta Trading Corp.* v. *F.T.C.*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958), 1958 CCH Trade Cases Sec. 69,099 (2d Cir., 1958), relied upon by the petitioners, has here been met and there is no conflict as to substantive law between the Circuits.

Actually, there is a substantial difference between the facts in the *Atalanta* case and the instant case, which makes the requirement of specificity urged by the petitioners inapplicable here even though actually met. In the *Atalanta* case the supplier was granting allowances to a favored customer to advertise a specific product only. The service or facility there involved was not an exclusive store publication or similar general facility which in itself constituted a beneficial promotional and advertising device for the favored customer's business generally, which the Court of Appeals found as a fact to be true of *Woman's Day*. The Court of Appeals found that each supplier made payments for *Woman's Day* which magazine "is an effective medium for the advertisement of the A & P Stores in general"; "creates good will among the customers of A & P", "attracts new customers for A & P and keeps its old ones" and "exists solely for competitive benefit to A & P's retail stores" (App. 25). Each Defendant supplier in making payments to *Woman's Day* was, therefore, paying for a service or facility which, as established by the evidence, promoted A & P's general business and traffic in innumerable ways, thus enhancing the sale of all products that the Defendant suppliers sold in A & P stores.

Where a supplier pays for a service or facility which promotes the business of the favored customer generally, that payment is in connection with the resale of all of the products of that supplier being sold by that customer. So long as any product of that supplier is then being handled by other retailers, and it was expressly stipulated that this was the fact in the instant case, those retailers are competitors of the favored customer as to that supplier's products generally.

## CONCLUSION.

For all of the foregoing reasons, we earnestly urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT MARKS,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

**No. 569**

GENERAL FOODS CORPORATION, HUNT FOODS, INC. and MORTON SALT COMPANY,

*Petitioners,*

*vs.*

STATE WHOLESALE GROCERS, ZEIGMUND WHOLESALE GROCERY CO., INC., RALPH C. BERG, D/B/A BERG'S FOOD STORE, *et al.*,

*Respondents.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MOTION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

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DANIEL WALKER.

December 29, 1958

Patrick Press, Inc., 74 Trinity Place, New York 6, N. Y. U. S. A.

IN THE

# Supreme Court of the United States

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## MOTION OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Great Atlantic and Pacific Tea Company (hereinafter "A&P") respectfully moves the Court for leave to file the annexed brief in support of the petition of General Foods Corporation, Hunt Foods, Inc. and Morton Salt Company for the grant of a writ of certiorari.

*Woman's Day* was founded in 1937 by a wholly-owned publishing subsidiary of A&P. It has become one of the leading national magazines.

> *Woman's Day* is of comparable content and quality with such other women's service magazines as *Good Housekeeping*, *Ladies Home Journal* and *McCalls* and has won national awards for its accomplishments in editorial, art and homemaking fields.
>
> Over 3,300,000 copies are purchased each month. For 14 years it has been among the top 10 magazines in paid circulation.
>
> Over 350 manufacturers of national brand products (of whom over half are manufacturers of products not of the type sold in A&P stores) each year advertise in one or more of the monthly issues of *Woman's Day*. Their payments have placed it for 14 years among the top 25 magazines (more recently in the top 12) in advertising revenue.

The propriety of this venture by A&P was questioned for the first time in 1956 when this treble-damage action was instituted as a spurious class suit in behalf of the over 13,000 retailers and wholesalers of grocery products in the Chicago Metropolitan Area and against A&P, Woman's Day, Inc., the magazine's publisher, and three advertisers, the present petitioners.

Plaintiffs-respondents abandoned either before trial or upon appeal their charges of violation of Sections 1 and 2 of the Sherman Act and of Sections 2(a) and 2(f) of the Robinson-Patman Act. The District Court's judgment dismissing the complaint thus stands affirmed with respect to A&P and Woman's Day, Inc. The Court of Appeals held, however, that the advertising payments to Woman's Day, Inc. made by petitioners violated Section 2(d) of the Robinson-Patman Act and reversed and remanded with respect to them.

A&P has a substantial and continuing interest in review by this Court of the decision below.

> The decision as it has been interpreted so adversely affected the advertising revenues of Woman's Day, Inc. as to compel A&P to dispose of its interest. Such an interpretation will inhibit the creation by retailers, including A&P, of new and different enterprises to compete for the patronage of all, including those with whom the retailer may also have the relationship of customer and supplier.

What happened to *Woman's Day* following the decision below demonstrates the point. Grocery product advertising is a major and essential factor for any women's service magazine. Many grocery product manufacturers were unwilling to run the risk of suit (which they found implicit in the decision whatever the method of operations of *Woman's Day* so long as A&P retained its interest in the publisher) by continuing to advertise in *Woman's Day*, particularly when the number of possible retailer plaintiffs was legend. This practical concern of advertisers and their advertising agencies and its effect upon *Woman's Day* compelled A&P to dispose of its stock in Woman's Day, Inc.

A&P submits that questions essential to the decision of this case are:

> 1. What is a "service or facility" within the meaning of the Robinson-Patman Act?
>
> 2. Did petitioners pay for such a service or facility?

The nature of "service or facility" under the Act is a question of significance to all retailers and manufacturers. For *Woman's Day* in this case, can be read other enter-

prises created by retailers and patronized by their suppliers. It is an important question of federal law which has not been, but should be settled by this Court.

The annexed brief (to the filing of which respondents have declined to consent) treats of the "service or facility" question as a reason for granting the writ without repetition of what is said by petitioners and independently of the important reasons they put forward.

Respectfully submitted,

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# BRIEF OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

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## BRIEF OF THE GREAT ATLANTIC AND PACIFIC TEA COMPANY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI.

### The Interest of A&P.

The interest of A&P in review by this Court of the decision below is:

(1) as the creator of a twenty-year old publishing enterprise whose advertising revenues were adversely affected by the decision; and

(2) as one of those who may be inhibited by the interpretation which has been given to the decision in creating or patronizing new enterprise if the two

parties to a transaction involving the new enterprise also deal with each other as supplier and customer.

## The District Court Decision.

The District Court (Campbell, D. J.) dismissed the complaint (154 F. Supp. 471 and Appendix to Appellants' Brief 160). It held that the advertising payments of petitioners did not "furnish" *Woman's Day* in violation of Section 2(e) of the Robinson-Patman Act (49 Stat. 1526 (1936), 15 U. S. C. §13(e) (1952)). Rather, so the court found, the success of *Woman's Day* depended upon the expertise of its publisher in providing editorial content appealing to readers which in turn made it of value as an advertising medium.

The District Court also held that the advertising payments did not violate Section 2(d) because it found that the shopper demand created by the national brand advertisements was satisfied in all grocery stores with only incidental benefit to A&P as one retailer and that the payments did not result in the shifting of a substantial portion of A&P's advertising costs as a retailer to the advertisers.

The District Court's decision was based upon analysis of the legislative history of the Sections and 183 detailed findings of fact.

## The Court of Appeals Decision.

The Court of Appeals majority (Major and Schnackenberg, C. J.; Finnegan, C. J., dissenting) (258 F. 2d 831 and Appendix to Petition 21) agreed with the District Court that the advertising payments did not "furnish" the magazine under Section 2(e).

The court held, however, that the payments had been made in violation of Section 2(d). Its conclusion insofar as relevant to this brief paraphrases the Section as follows:

> "The defendant suppliers paid, and contracted to pay, money to Woman's Day, Inc., a controlled subsidiary of A&P, for advertising in a magazine furnished by A&P in connection with the sale of products manufactured, sold, or offered for sale by said suppliers. §2(d) made that transaction unlawful . . ." (App. 32).

The Court of Appeals did not mention the legislative history, but rather referred to Section 2(d) as establishing a "rigid definition" (App. 31). Without discussion it found certain unspecified facts contrary to the findings of the District Court.

The decision leaves in doubt whether the conclusion of the Court of Appeals was reached by reason of a construction of Section 2(d) as applicable to all transactions between suppliers and their customers or upon the particular facts here involved.*

## Summary of Argument.

The decision below has been interpreted as construing Section 2(d) to apply to all supplier-customer transactions simply because that relationship also exists. It thus poses an important question not heretofore considered by the Court—

> What is the nature of the services and facilities to which the restrictions of Section 2(d) and its companion Section 2(e) apply?

---

* A petition for rehearing was denied (Finnegan, C. J., dissenting (App. 41) as was a petition for rehearing *en banc* (Duffy, Chief Judge, and Finnegan, C. J., dissenting) (App. 40).

This question should be resolved by construing the Sections to apply only where the "service" is such that in paying for it or furnishing it a supplier significantly aids a customer in the performance of the customer's own merchandising or distribution functions—not where the supplier in performing his own functions deals with an autonomous enterprise created by a customer. Such a test is to be derived from the terms and legislative history of the Sections.

The decision is erroneous when the record is read in the light of this construction of the Sections.

## Argument.

### The Important Question Posed by the Decision Below.

The Court of Appeals majority stated the naked conclusion that for a manufacturer whose products were sold by A&P to pay for advertisements in *Woman's Day* constituted a transaction covered by Section 2(d) of the Robinson-Patman Act.

The incidents of the transaction which led to this result are not specified or explained. Indeed, the decision contradicts itself in stating the transaction considered by the court to be involved—a payment "for the advertisement" and therefore not in violation of Section 2(e) (App. 31), yet a payment "for advertising in a magazine" and therefore in violation of Section 2(d) (App. 32).

The decision's absolutist conclusion, the ambiguous reference to a "rigid definition" in Section 2(d) with emphasis upon the "*fact* of paying" (App. 31) and the absence of discussion all create ambiguity. No reference is made to the legislative history which all the parties agreed and the District Court held was of determinative importance.

Ambiguity in turn lends itself to the pernicious interpretation that all transactions between suppliers and their customers come within the restrictions of Section 2(d), or of Section 2(e), simply because the supplier-customer relationship also exists.

This interpretation has been placed upon the decision. Many advertisers of grocery products whose advertising is essential to a women's service magazine were unwilling to advertise in *Woman's Day* so long as A&P retained an interest in the magazine's publisher despite changes in its operation which eliminated the features upon which plaintiffs-respondents had relied. In the advertisers' view the decision created a risk of suit which they were unwilling to run. A&P was forced to dispose of its interest.

The interpretation which has been placed upon the decision extends the application of the Sections beyond any previous case. The creation of new enterprise is inhibited —indeed in practice forbidden to those who already either buy or sell. Freedom of entry is restricted, and Sections 2(d) and 2(e) are placed in conflict with the body of antitrust law of which they are a part and in the light of which the Robinson-Patman Act is to be construed. *Automatic Canteen Co.* v. *Federal Trade Comm'n.*, 346 U. S. 61, 74; *Standard Oil Co. (Indiana)* v. *Federal Trade Comm'n.*, 340 U. S. 231, 248-249.

Heretofore, this Court has not had occasion to draw a distinction between those transactions which come within the Sections and those which do not—between cooperative merchandising allowances and services, on the one hand, and a manufacturer's patronage of an autonomous enterprise created by a retailer, on the other. In *Corn Products Refining Co.* v. *Federal Trade Comm'n.*, 324 U. S. 726, for example, the manufacturer had advertised the candy sold by one customer alone as containing the manufacturer's dextrose.

In the *Elizabeth Arden* cases, *cert. denied,* 326 U. S. 773 and 331 U. S. 806, the manufacturer paid all or a portion of the salary of a retailer's sales-clerk to act as a demonstrator of the manufacturer's cosmetics. There could be little question concerning the nature of the transaction. The dispute centered on other issues.

Here, the nature of the transaction—whether it was payment for a service or facility within the meaning of the Sections—is an essential issue which should be resolved by this Court.

How this issue should be resolved and the result contrary to that below which its proper resolution would compel, in A&P's submission, is briefly outlined in the remainder of this brief.

**The Proper Construction of Sections 2(d) and 2(e).**

A&P submits that there is a fundamental distinction which needs to be drawn—and is required by the terms, history and prior application of Sections 2(d) and 2(e)—between those transactions between supplier and customer which are proximately connected with the performance of the customer's functions *qua* customer and those which are proximately connected with some other enterprise, here the publication of a magazine, which the supplier or customer has created.

A&P urged below that Sections 2(d) and 2(e) apply only to a specific practice—supplier assistance (either by a payment or the furnishing of some physical help) to a customer in the customer's distribution or merchandising ("processing, handling, sale, or offering for sale") of the product which the customer has purchased.

The test is whether the supplier is contributing to a "service or facility" which is both:

(i) in connection with the customer's own distribution or merchandising of the particular product and thus inherently the customer's, not the supplier's, function to perform; and (ii) of direct and significant, rather than incidental, benefit to the customer in that the customer is enabled to shift a substantial portion of his own distribution or merchandising costs to the supplier.

*Nature of the practice*—The specific practice has been recognized. It is known as "cooperative merchandising" which it has been said the Sections were enacted to regulate. Dunn, "Sections 2(d) and (e)", CCH *Robinson-Patman Act Symposium* 55 (1946).

The distinction in nature and purpose between "cooperative merchandising" where the manufacturer contributes to retailer advertising, on the one hand, and manufacturer brand advertising, on the other, has been described by the Federal Trade Commission in its *Report on Distribution Methods and Costs: Part V: Advertising as a Factor in Distribution* (1944).

In the former, manufacturers contribute to retailer advertising with its emphasis upon the prices, services and identity of the retailer, its featuring of brands as a means of attracting trade to the retailer's place of business and its use of local newspaper advertisments, hand bills, in-store displays, etc.; manufacturers do so to have some control over retailer advertising of their products (*Report* at 16). In the latter, in order to create general consumer demand, manufacturers advertise their own products under their brand names and typically without reference to price or where the product may be purchased; they place their advertisements in national media, (*Report* at 2, 9-10).

One is supplier assistance to a customer in performing the customer's own functions. The other is performance

by the supplier of his own functions, and it should not matter that the medium the supplier chooses happens to be the product of a customer's autonomous enterprise.

*Language of the Sections*—This economic distinction is expressed in the language of Sections 2(d) and 2(e).

The Sections do not reach payment for or the furnishing of every "service or facility." Congress did not stop short at an all-inclusive definition. It added a significant limiting phrase.

The service or facility must be "in connection with" (Section 2(d)) or "connected with" (Section 2(e)). The connection must be with "processing, handling, sale, or offering for sale" by the customer (of the product "manufactured, sold, or offered for sale" by the supplier [Section 2(d)] or "bought for resale" and "so purchased" by the customer [Section 2(e)]).

Similarly, the phrase "proportionally equal terms" assumes that the service is an element of a customer function and that consequently competing customers having similar functions to perform are by hypothesis on a proportionally equal footing.

Again, in defining competing customers the focus is on those who are competing "in the distribution" (Section 2(d)). The term "discrimination" in Section 2(e) makes the same point since, as explained by Congressman Utterback who introduced the Section, it means a difference between those whose relationship is such that they are entitled to comparable treatment, e.g., those who are competing "in the resale" of the product concerned. 80 Cong. Rec. 9416 (1936).

*Legislative history*—All parties and the District Court recognized that the legislative history of the Sections is vital to decision.

The specific practice which Congress intended to prohibit is explicitly defined under the heading "Service Allow-

ances" in both the Senate and House Committee Reports as follows:

> "Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case *the customer is deriving* from it *equal benefit to his own business* and *is thus enabled to shift to his vendor substantial portions of his own advertising cost*, while his smaller competitor, unable to command such allowances, cannot do so." S. R. No. 1502 at 7, H. R. No. 2287 at 15-16, 74th Cong. 2nd Sess. (1936) (emphasis supplied).

Senator Logan, who submitted the Senate Report, described such services as "those to be rendered by the buyer in the resale of goods which he has purchased from the manufacturer"; he pointed out that such allowances are paid customers "for doing only what they must do in any case for their own advantage and profit" 80 Cong. Rec. 6257 (1936).

The legislative history confirms that Sections 2(d) and 2(e) were intended to apply to assistance by a supplier of more than incidental benefit to the customer in connection with the customer's performance of what is inherently his function to perform in reselling the products he has purchased. The customer receives such a benefit "to his own business" from the service for which the supplier pays in the sense that "substantial portions of [the customer's] own advertising cost" are shifted to the supplier.

*Prior application*—The cases have previously refused to extend the application of Section 2(d) and 2(e) to transactions between supplier and customer merely because the transaction could be said to relate in some manner to products sold by the supplier to the customer and to be of some incidental benefit to the customer.

*Skinner* v. *United States Steel Corp.*, 233 F2d 762 (5th Cir. 1956)

(supplier made payroll deductions from its employees' wages to cover their purchases on credit from a retailer-customer; *held* not a "merchandising service" with respect to a "specific commodity").

*American Can Co.* v. *Russellville Canning Co.*, 191 F2d 38 (8th Cir. 1951)

(supplier paid one customer a "runway allowance" since the adjoining location of customer's plant permitted delivery by runway; *held* not a payment for a service).

*Chicago Seating Co.* v. *S. Karpen & Bros.*, 177 F2d 863 (7th Cir. 1949)

(supplier quoted a special line of his products to some but not all of the customers for his regular line with the result that some customers were prevented from bidding on contracts for which the supplier had arranged the specifications; *held* that the quoting of prices on the special line was not a service but rather an invitation to negotiate).

*General Foods Corp.*, FTC Dkt. No. 6018, CCH Trade Reg. Serv. Par. 25, 888 (1956)

(supplier paid for the delivery services of certain customers; *held* that the payments were not "made to the [customer] as a customer" and "not made in connection with the resale of goods bought by him").

These cases establish that not every transaction between supplier and customer comes within Sections 2(d) and 2(e) and that the Sections must be applied only to the transactions at which they are directed.

The other cases which have arisen under Sections 2(d) and 2(e) involved services which, as the District Court said (App. 59), were "inherently discriminatory" and "primarily designed to benefit only the customer".

The proper distinction between supplier assistance to a customer *qua* customer and supplier patronage of an enterprise provided by a customer in another capacity is not novel. It has long since been indicated by this Court's decisions under the provisions of the Interstate Commerce Act which prohibit carrier discrimination between shippers but permit carriers to employ and pay for the "transportation" services of shippers.* See *Tap Line Cases*, 234 U. S. 1, *United States* v. *Baltimore & O. RR*, 231 U. S. 274 and *Interstate Commerce Comm'n.* v. *Diffenbaugh*, 222 U. S. 42, where the carrier made use of the services of shippers as, respectively, a tap line owner, a freight terminal operator and a grain elevator operator.

**The Instant Record.**

If the suggested construction of Sections 2(d) and 2(e) is correct it becomes necessary to judge the record in its light.

The case was submitted to the District Court on a record consisting of 181 printed pages of stipulations and more than 1,000 exhibits. The District Court, having "carefully considered all of the evidence" made 183 detailed findings of fact, 154 F. Supp. 471, 485-506 and Appendix to Appellant's Brief 186-227. The Court of Appeals without discussion, analysis or even identification found "certain facts . . . contrary to some found by the district court" (App. 23).**

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* Sections 2, 3 and 15 (13), 24 Stat. 379, 380, 384 (1887) as amended 49 U. S. C. §§ 2, 3, 15 (13) (1952).

** It has been estimated that if the case had not been submitted on a stipulated record, the trial time would have been six months

The new findings appear to be the court's statements concerning *Woman's Day*. (The court's reasoning that the petitioners did not furnish *Woman's Day* because they were "simply buying an advertisement" and the non-discriminatory character of the advertisements are discussed in the petition, and the discussion will not be repeated here.) In one short paragraph the court described *Woman's Day* as an effective advertising medium for A&P, as creating good will among A&P customers, as attracting and keeping customers, as a promotional operation, and finally as existing "solely" for A&P's competitive benefit (App. 25).

It is significant that the court's staccato description begins as an opinion of results and culminates as an ascription of intent. Yet, the court carefully held that motive and intent are irrelevant (App. 31-32).

The determinative issue, if it be assumed *arguendo* that the magazine not the advertisements was that for which petitioners paid, is the competitive effect of *Woman's Day*. Was this successful national magazine a promotional operation existing solely for A&P's competitive benefit as a retailer? Did it in fact have an impact on sales, was it

---

requiring the testimony of perhaps 200 witnesses. *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges*, 21 F. R. D. 395, 499 (1957). This very virtue of a stipulated record, however, in the Court of Appeals' view (App. 22) gave it freedom to brush aside what the District Court had done. This Court did not in *United States* v. *E. I. du Pont & Co.*, 353 U. S. 586, 598-606 (cited by the court below) reverse the lower court's findings without carefully and at length pointing out where the conclusion erred. The same cannot be said of the instant decision. The effect will be to discourage both the use of a stipulated record in the presentation of cases which would otherwise require protracted trials and the making of detailed findings by the trial court in cases where a stipulated record is used. It is submitted that some weight—whether the formula is that of Rule 52(a) or not—should be given by the reviewing court to findings in such a case and that the problem exemplified by the instant decision calls for the exercise of this Court's power of supervision. See Judge Hand's discussion in *United States* v. *Aluminum Co. of America*, 148 F. 2d. 416, 433 (2d Cir. 1945).

a traffic builder, could it be isolated as a significant competitive factor?

The plaintiffs-respondents, whose burden of proof it was, failed to introduce any evidence that their customers had been diverted to A&P. Significant as showing their opinion of the competitive value of a store-distributed magazine is the fact that a majority of the 17 retailer-respondents who had such a magazine (*American Family* or *Better Living*) available to them never carried it and others only did so for short periods (Appellants' Appendix 216-219).

The uncontradicted and objective evidence of the absence of competitive impact of *Woman's Day* was adduced by A&P and Woman's Day, Inc.

> Comparative statistics of A&P sales and *Woman's Day* circulation showed no relation between the two (Appellants' Appendix 208).
>
> An independent survey of shoppers at the A&P stores near the stores of plaintiff-respondents showed that only 23 of the 4,602 shoppers interviewed gave *Woman's Day* or "A&P magazine" (which might have meant other magazines sold in the store) as a reason for shopping at A&P. This reason figured only this minimal number of times among the total of 9,621 reasons given. (Appellants' Appendix 208-211)

The District Court held that the record was "absolutely devoid of any evidence that *Woman's Day* was created for any purpose other than for legitimate business reasons" (Appellant's Appendix 184).

The District Court found that:

> "Woman's Day, Inc. is operated as a legitimate business enterprise. Its business is that of publishing a magazine to be sold on its own merits as a magazine" (Appellants' Appendix 195).

"The distribution of *Woman's Ddy* in A&P stores has no immediate impact on the sales of those stores" (Appellants' Appendix 213).

"*Woman's Day* cannot be isolated as a factor causing persons to shop at A&P stores" (Appellants' Appendix 214).

"There is no evidence that any plaintiff has lost sales or customers or profits as a result of the distribution of *Woman's Day* by A&P stores" (Appellants' Appendix 225).

A&P submits that examination of the record will show that *Woman's Day* was not of direct and significant benefit —of more than incidental benefit—to A&P in connection with the performance of its merchandising function as a retailer.

## Conclusion.

It is submitted that for the reason herein set forth and for the reasons stated in the petition, the writ of certiorari prayed for should issue.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

## No. 569

GENERAL FOODS CORPORATION, HUNT FOODS, INC. and MORTON SALT COMPANY,

*Petitioners,*

vs.

STATE WHOLESALE GROCERS, et al.

*Respondents.*

## OBJECTIONS TO MOTION OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Respondents respectfully urge the denial of the Motion of the Great Atlantic & Pacific Tea Company (hereinafter referred to as "A & P") for Leave to File a Brief as *Amicus Curiae* in Support of the pending Petition for Writ of Certiorari.

A & P has, in effect, filed its b as *amicus curiae* by appending the same to its Mot It received the consent of no party to the cause for such action. Consequently, it is in violation of the substance of Rule 42 of the Rules of this Court. Although this Court has not commented upon the effect of this practice, the Supreme Court of Illinois summarily denies such motions when accom-

panied by the brief sought to be filed. *Froehler* v. *North American Life Ins. Co. of Chicago*, 374 Ill. 17, 27; 27 NE 2d. 833, 838 (1940). It is respectfully submitted that because of A & P's breach of Rule 42, its Motion should be summarily denied.

There are other compelling, cogent reasons for denial of the Motion. A & P is no longer a party to this cause, having been dismissed out of the case by reason of the abandonment by Plaintiffs of all issues under Sections 2(a) and 2(f) of the Clayton Act. Its appearance here has not received the consent of any of the parties hereto. It is not interested in any other case which will be affected by the decision of this one. Its application, therefore, falls directly within the prohibition expressed by this Court in *Northern Securities Co.* v. *U. S.*, 191 US 555 (1903) wherein at page 556 this Court said:

> "It does not appear that applicant is interested in any other case which will be affected by the decision of this case; as the parties are represented by competent counsel, the need for assistance can not be assumed and consent has not been given. Leave to file must, therefore, be denied."

A & P having disposed of its ownership of the magazine, *Woman's Day*, the service or facility here involved, it thereby, rid itself of any possible interest in the future of that magazine or the effect of any decision of this Court relative thereto. Nor is any past loss of advertising revenues by A & P, even if attributable to the decision herein, sufficient to constitute a present interest inasmuch as the decision of this Court can not in any way affect such past interest of A & P in that magazine, nor can A & P incur any possible future liability by reason of the limited 2(d) issue here involved. Further, although A & P seeks to predicate an "interest" upon a speculative assumption that the decision, if allowed to stand, will affect future autonomous enterprises which it, A & P, might contemplate wherein both customer and supplier

may be involved, it sets forth no facts or bases whatsoever justifying such speculation. Such speculative "interest" of A & P in a cooperative service or facility which might at some future time be contemplated is no different than the interest of any other supplier or retailer of any commodity who similarly might contemplate a future cooperative promotional plan. Should participation as *amicus curiae* be granted for such reasons, there would be no limit or meaning to the concept.

Further, contrary to Rule 42 (3) A & P has failed to set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties relevant to the disposition of the Petition for Certiorari. Both the Motion of A & P and the brief appended thereto are devoted exclusively to the merits and fail in any way to urge grounds for or arguments in support of the Petition for Certiorari not contained in the Petition heretofore filed.

Respondents are not here filing any answer to the prematurely filed brief of A & P. Should this Court grant the Motion, Respondents respectfully request sufficient time within which to file a brief in opposition to the appended brief of A & P.

For all of the foregoing reasons, Respondents respectfully urge the denial of the Motion of A & P for Leave to File its brief as *Amicus Curiae* or, in the alternative, should the Motion be granted, Respondents request a reasonable amount of time within which to file their brief in opposition thereto.

Respectfully submitted,

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